Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

81-35

No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

JACK VAN HYNING,

Appellant,

v.

UNIVERSITY OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

ROBERT H. WAGSTAFF
WAGSTAFF, MIDDLETON & POPE
912 West Sixth Avenue
Anchorage, Alaska 99501
(907) 277-8611
Counsel for Appellants.

Anchorage, Alaska • Ken Wray's Print Shop, Inc. • (907) 276-4535

QUESTION PRESENTED

Can the highest court of a State avoid a holding of the United States Supreme Court recognizing procedural due process for college faculty in tenure proceedings by *sua sponte* requiring for standing that an unrepresented, six year employed, mandatory "tenure or out" faculty member have first appeared without meaningful notice before the body that determined him to be incompetent and which denied him the due process of law?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CASES AND AUTHORITIES ii
INTRODUCTION 2
OPINION BELOW 2
JURISDICTION 2
REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED 3
STATEMENT OF THE CASE 4
ARGUMENT 8
I. JACK VAN HYNING HAS BEEN DENIED THE DUE PROCESS OF LAW BY THE UNIVERSITY OF ALASKA; THE QUESTION PRESENTED IS SUBSTANTIAL 8
II. ANY APPLICATION OF THE EXAUSTION DOCTRINE FOR STANDING IS INAPPROPRIATE IN THIS CASE 12
CONCLUSION 14
APPENDIX:
I. OPINION OF THE SUPREME COURT OF THE STATE OF ALASKA 12
II. UNIVERSITY OF ALASKA FACULTY BULLETIN NO. 1970-71-5 ..... 5a
III. NOTICE OF APPEAL 15a
IV. STIPULATED STATEMENT OF FACTS OF THE PARTIES 18a

TABLE OF CASES AND AUTHORITIES

Cases: *Page*

Allied Stores of Ohio v. Stanley J. Bowers, 358 U.S. 522, (1959) 3
Board of Regents v. Roth, 408 U.S. 564 (1972) 8, 9, 10, 11, 12
Goldberg v. Kelly, 397 U.S. 254 (1970) 11
Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) 11, 12
Myers v. Bethelem Ship Building Corp., 303 U.S. 41, 50-51 (1938) 13
Perry v. Sindermann, 408 U.S. 593 (1972) 8, 10, 11
United States Constitution:
Fourteenth Amendment 3

No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

JACK VAN HYNING,

Appellant,

v.

UNIVERSITY OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

INTRODUCTION

This is an appeal from the Opinion of the Alaska Supreme Court announced on January 26, 1981, Rehearing as denied on April 6, 1981, and Mandate as issued on April 7, 1981. The Alaska decision upheld the University of Alaska's secret denial of mandatory "tenure or out" to Assistant Professor Jack Van Hyning, Ph.D., thereby forever foreclosing future employment with the University of Alaska and, for all practical purposes, requiring him to move from the State if he is to follow his chosen career.

This Jurisdictional Statement is submitted to show that the United States Supreme Court has jurisdiction of the appeal and that a substantial question is presented meriting plenary consideration.

OPINION BELOW

The Opinion of the Supreme Court of the State of Alaska, not yet reported, appears in Appendix I.

JURISDICTION

The mandate of the Supreme Court of the State of Alaska was entered on April 7, 1981. Notice of appeal and this Jurisdictional Statement were filed within ninety (90) days of that date (Appendix III). This Court's jurisdiction is invoked under 28 USC 1257 (2). This Court should make an independent determination of standing to raise a federal constitutional issue:

> The first and preliminary question thus is whether the Supreme Court of Ohio correctly held that appellant lacked standing to prosecute the constitutional question sought to be presented. It is settled that
>
> "[w]hether a pleading sets up a sufficient right of action or defense, gounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense,

and is not concluded by the view taken of them by the state court." *First Nat. Bank v. Anderson*, 269 U.S. 341, 346, 70 L ed 295, 302, 46 S Ct 135; *Staub v. Baxley*, 355 U.S. 313, 318, 2 L ed 2d 302, 309, 78 S Ct 277.

Allied Stores of Ohio v. Stanley J. Bowers, 358 U.S. 522, 525 (1959).

REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED

University of Alaska Faculty Bulletin No. 1970-71-5 promulgated on 1/27/71, as set out fully in Appendix II, and which has the force of law, provides in pertinent part:

> Any member of the faculty who has not been offered tenure shall not be retained at the University of Alaska after six years of continuous full time service at the rank of Assistant Professor or above.
>
> * * *
>
> Tenure reviews will be rigorous, providing assurance that persons of doubtful qualifications will not be retained and that the University's needs are best met. In this way, the "tenure or out" policy will serve as an active force in the development and maintenance of excellence in faculty and programs.

The 14th Amendment of to the Constitution of the United States provides in pertinent part:

> §1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Marine biologist Dr. Jack Van Hyning was denied tenure status by the University of Alaska. The University's "tenure or out" process is mandatory. After six years of employment all faculty must submit to the process to assure "that persons of doubtful qualifications will not be retained" (Appendix II). A faculty member who is denied tenure can never again be employed at the University of Alaska. This is in addition to the stigma of being formally found in peer review to be a person of "doubtful qualifications."

Despite the enormous significance of the tenure decision at the University of Alaska the mandatory tenure candidate is admittedly denied the basic procedural due process which would ensure the decision to be at least a fair one. The candidate is not permitted to see the written evaluation statements of his or her colleagues. Candidates are not permitted to see any other materials concerning their qualifications that are before the Tenure Committee. Candidates are not permitted to be present when colleagues are testifying about their performance and qualifications. The candidate is not permitted to question those who testify. No rebuttal is possible. No record of the proceedings is maintained. No reasons for denial are given (Opinion, Appendix I and Stipulated Statement of Facts of the Parties, Appendix IV).

The Opinion of the Supreme Court of Alaska sets forth the following facts:

> Jack Van Hyning was hired by the University of Alaska in the capacity of Assistant Professor of Fisheries Biology in June of 1967 for a 12 month term. This contract was renewed in 1968, 1969, 1970, and 1971. The University's tenure policy, incorporated into Van Hyning's contract, provides that if tenure is not granted at the end of a probationary period, not to exceed six years, a terminal contract may be offered to the probationary employee. One who has been denied tenure is thereafter ineligible for full-time employment at the University.

Briefly, the tenure policy calls for a multi-tiered evaluation of a candidate's effectiveness in teaching, research, intra-faculty relationships, participation in professional societies and service to the University and the general public. The process begins with the recommendation of the head of each faculty department as to each untenured person who has completed four years of service, and proceeds through the hands of the appropriate dean, and vice president, finally reaching the university committee on tenure. This committee, composed of seven tenured faculty members elected by their peers, makes an independent evaluation of each tenure candidate. In addition to these written recommendations, the committee may request supplemental information from the applicant, his superiors, tenured colleagues or other persons. If the committee recommends to the president that tenure be denied, the applicant is entitled to notification of that decision. A person who is denied tenure during his fifth year of service may request reconsideration of his case by the president of the University.

In Van Hyning's case the committee recommended against granting tenure. He did not appear before the committee although he was entitled to. *The University stipulated that had Van Hyning requested to see the materials it considered in reaching its decision he would have been denied access. It stipulated further that had he so requested, he would have been denied the opportunity to question faculty members whom the committee interviewed in reaching its decision. No statment of reasons for recommending denial of tenure was provided.* Van Hyning did not request the president to grant reconsideration of his case.

When the university president informed Van Hyning in April of 1972 of the tenure committee's decision, Van Hyning accepted a terminal contract and resigned effective June 30, 1973. On May 27, 1976, he sued the University alleging violations of procedural due process in denying him tenure. The University's motion to dismiss under Alaska Rule of Civil Procedure 12(b)(6) was granted. The

> superior court found the action lay in tort and not in contract, and was thus barred by the two year statute of limitations. ***Additionally, on the merits the court decided that no liberty or property interest was implicated by the denial of tenure and that plaintiff was not entitled to a due process hearing on the question of tenure.*** This appeal followed (emphasis supplied, footnotes omitted, Appendix I).

The Alaska Court did not address any of the issues raised before the trial court which by agreement were:

(1) Was the University of Alaska required to provide Jack Van Hyning with a due process hearing concerning its refusal to grant him tenure either before or after that decision was reached.

(2) If plaintiff has stated a cause of action, is that cause of action barred by the Statute of Limitations.

(3) If plaintiff prevails on his claim on the merits, is he entitled to damages in the nature of back wages only if he is granted tenure after a due process hearing (Stipulation, Appendix IV).

Instead, it found *sua sponte* that Van Hyning had failed to adequately exhaust the very process he complained of:

> Here Van Hyning did not appear before the tenure committee and did not take his case to the president after the tenure committee had made its unfavorable recommendation. These failures deprived the University of the opportunity to take further action on his case which could have inlcuded a decision affording him tenure. Van Hyning argues that pursuing his remedy administratively any further than he did would necessarily have been futile, but this argument is unsupported in the record, and is essentially incapable of being verified since the effort was not in fact made.

Van Hyning argues before this Court on Appeal that it would have been *a fortiori* futile for him appear at any proceeding where he would not have been aware of any of the

now apparent negative allegations against him, much less have been able to present any meaningful response.

At any such "appearance" Van Hyning would have been denied access to *any* materials and information being considered by the committee and would have been unknowing of and unable to address any allegations or question any of the faculty members the committee interviewed. The Alaska Court has held that because Jack Van Hyning chose not to appear before an inquisitorial tribunal at which he would have no right to fair hearing and treatment, he failed to exhaust his administrative remedies. If procedural due process has any purpose, such an appearance would have been meaninglessly futile. The Alaska decision functionally sustains the validity of the tenure process by erroneously failing to rule on its validity.

So too with any purported resort to the University President. Indeed, it was the President who actually denied tenure upon the Tenure Committee's recommendation. It was stipulated below by the parties that:

> In April of 1972 plaintiff was informed that he was denied tenure by the President of the University of Alaska, William R. Wood, upon the recommendation of the Tenure Committee (Stipulation, Appendix IV).

The Alaska Court further ignored the parties' stipulation that Jack Van Hyning was advised to resign by an agent of the University and did in fact resign in order to minimize the professional impact of the denial of tenure. By this action Van Hyning was precluded from pursuing any administrative remedy (Paragraph VI, Stipulation, Appendix IV).[1]

Jack Van Hyning's complaint is with the lack of due process afforded him by the Tenure Committee and the University President. This tenure policy was adopted by the Board of Regents of the University of Alaska. By structural definition it

---

[1]Van Hyning was not represented by counsel prior to the initiation of this litigation.

would have been futile for Jack Van Hyning to ask either the President of the University of Alaska or the Tenure Committee to change procedures adopted by the Board of Regents. There is no appeal to the Board of Regents.

The Alaska Court has chosen to ignore these factual realities within the record in avoidance of this Court's holding in *Board of Regents v. Roth*, infra. Jack Van Hyning is now forever foreclosed from teaching at the University of Alaska because of the Alaska Court's finding that he should have appeared at a proceeding in which he would have admittedly been denied due process and proceeded therefrom to a person who admittedly had no power to change the rules complained of and who had already denied him tenure.

ARGUMENT

I. JACK VAN HYNING HAS BEEN DENIED THE DUE PROCESS OF LAW BY THE UNIVERSITY OF ALASKA: THE QUESTION PRESENTED IS SUBSTANTIAL

There are two seminal United States Supreme Court cases addressing the issue of tenure in higher education: *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972).

Roth was hired by Wisconsin State University for his first teaching job as Assistant Professor for a fixed term of one academic year. He completed that year but was informed that he would not be rehired. The University refused to give him any sort of a due process hearing. This Court held that the requirements of procedural due process applied to deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. The Court found that Roth was not deprived of any property interests inasmuch as his contract was for only one year; the mere hiring for one year did not give rise to any procedural rights. Jack Van Hyning, however, was not simply "hired for one year" but had his contract renewed for six years with the full expectation of continued employment absent a finding during the mandatory tenure process that he was a person of doubtful qualifications.

The Tenure Committee did not decide "simply not to renew" Jack Van Hyning's contract as was the case with Roth, but rather made an affirmative finding that Van Hyning lacked competence in his field to the degree that he could never again teach at the University. The *Roth* Court stated in language which is directly applicable here:

> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. *The State, for example, did not involve any regulations to bar the respondent from all other public employment in State universities. If it had done so, this again would be a different case. For 'to be deprived not only of present government employment but of future opportunity for it is no small injury' (Citations omitted.)* The Court has held, for example, that a state, in regulating the eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravenes due process'. (Citation omitted) And, specifically, in a manner that denies the right to full prior hearing (Citation omitted) *Ibid.* 408 U.S. 573-574; (emphasis supplied).

This is that different case. Jack Van Hyning is in fact forever barred from other employment in his profession at the University of Alaska and, practically speaking, anywhere else in Alaska. The Alaska tenure process is not elective, it is mandatory. In *Roth*, the Court found that the terms of respondent's appointment secured no interest in re-employment the next year. Jack Van Hyning, however, had an expectation of continued employment absent an affirmative finding that he was "doubtfully qualified". He was, in fact, re-employed for six continuing and successive years. The method by which Jack Van Hyning was not re-employed was by an affirmative denial of tenure, not a passive non-renewal of his contact.

Speaking of Fourteenth Amendment liberty interests in *Roth*, this Court stated:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to

> engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of their conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. 408 U.S. at 572.
>
> * * *
>
> The state, in declining to rehire the respondent did not make any charge against him that might seriously damage his standing and association in his community. It did not base the nonrenewal of his contact on a charge, for example, that he had been guilty of dishonesty or immorality. Had it done so, this would be a different case. For 'where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential.' (Citations omitted). *In such a case, due process would accord an opportunity to refute the charge before university officials.* In the present case, however, there is no suggestion whatever that the respondent's interest in his 'good name, reputation, honor or integrity' is at stake. 408 U.S. at 573 (emphasis supplied).

Sindermann examines in more depth the concept of Fourteenth Amendment property. The Court held that a teacher employed for a number of years in the same institution should be permitted to show that he or she did have an expectation of continued employment. Speaking of *Roth*, the Court noted:

> We have held today in *Board of Regents v. Roth*, (Citation omitted) that the Constitution does not require opportunity for hearing before the non-renewal of a non-tenured teacher's contract *unless he can show the decision not to rehire him somehow deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment*, despite the lack of tenure or a formal contract. In *Roth*, the teacher had not made a showing on either point to justify a summary judgment in his favor. 408 U.S. at 599 (emphasis supplied).

Jack Van Hyning had an understanding and property interest as articulated in the Tenure Bulletin (Appendix II) that he would continue at the University unless he was found to be "doubtfully qualified". He is no longer at liberty to ever again be hired by the University of Alaska.

The Court noted in *Sindermann:*

> We have made clear in *Roth* (Citation omitted) that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid,* 408 U.S. 601.

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), welfare recipients challenged the termination of their benefits without pretermination notice of a hearing. The significance of *Goldberg* here is the *Roth* Court's characterization of that case. The welfare recipients in Goldberg, said the Court, "had a claim of entitlement to welfare benefits that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so." *Roth,* 408 U.S. at 577.

In the case at bar, Jack Van Hyning's relationship with the University was terminated on the ground that he did not meet the University's standards. As the recipient in *Goldberg,* he claims that he was eligible for tenure under regulations which establish those standards, and seeks a fair hearing at which he can attempt to demonstrate his entitlement under the regulations.

In *Goldsmith* v. *Board of Tax Appeals,* 270 U.S. 117 (1926), a certified public accountant was denied the right to practice before the Board of Tax Appeals on the ground that he was unfit. While the *Goldsmith* Court decided the case on grounds

other than procedural due process, the *Roth* Court took note of the dicta concerning notice and fair hearing, stating that *Goldsmith* was entitled to those procedural rights because "the existence of the Board's eligibility rules gave petitioner an interest and claim to practice before the Board to which procedural due process requirements applied." 408 U.S. at 576, n. 15.

Like the certified public accountant in *Goldsmith*, Jack Van Hyning falls within the class of persons eligible to be considered for tenure; indeed, his participation in the process was required as a condition of employment. As in *Goldsmith*, the government agency determined, without hearing, that he did not meet its standards of fitness for tenure.

II. ANY APPLICATION OF THE EXHAUSTION DOCTRINE FOR STANDING IS INAPPROPRIATE IN THIS CASE

The Alaska Supreme Court stated that:

> Here Van Hyning did not appear before the tenure committee and did not take his case to the president after the tenure committee had made its unfavorable recommendation (Appendix I).

Any appearance before the tenure committee would have been *a fortiori* meaningless. Van Hyning would have known none of the contents of the proceedings. He would not have known or have had access to the written and oral testimony of his colleagues. He could not have answered any accusations or rebutted any innuendo. From any perspective such an inquisitorial appearance would have been meaningless, futile and humiliating.

There was also no way that Van Hyning could "take his case to the president" as suggested by the Alaska Court. It was in fact the president who exparte denied him tenure based upon the Tenure Committee's recommendation. Perhaps the Alaska Court meant Van Hyning should have asked for reconsideration; but the parties stipulated below that Van Hyning resigned as the direct and proximate result of being denied tenure in an effort to reduce professional impact (Appendix

IV). Van Hyning could not resign, appeal, and ask for reconsideration simultaneously.

In *Myers* v. *Bethelem Ship Building Corp.*, 303 U.S. 41, 50-51 (1938), it was recognized that a basic principle of administrative law is that "no one is entitled to judicial relief for a supposed or threatened injury until the *proscribed* administrative remedy has been exhausted (emphasis supplied)." The mandatory tenure candidate has absolutely no proscribed administrative remedy in either appeals, pleas to the President of the University who has already made his decision, or to any grievance committee. It is axiomatic that the agency to whom administrative remedies are addressed must have sufficient authority to accord the relief sought. The purported administrative procedures suggested by the Alaska Court are accordingly inappropriate and would have proven unavailing inasmuch as the procedural actions complained of were those specifically approved by the Board of Regents. Neither the tenure committee nor the President had the power to alter the secrecy of the tenure process and made their decisions accordingly.

CONCLUSION

Jack Van Hyning's teaching career has been irrevocably terminated for reasons unknown and through a process that is unfair. To this day Van Hyning does not know the actual basis for this decision nor has he been given any opportunity to rebut his accusers. The Alaska Supreme Court has compounded this injury by holding that Van Hyning did not adequately participate in the very offending process.

The question presented is of substantial Constitutional magnitude so as to merit plenary treatment by the Court.

If this matter is not properly raised on appeal then it is requested that this Jurisdictional Statement be treated as a Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 6th day of July, 1981.

ROBERT H. WAGSTAFF
WAGSTAFF, MIDDLETON & POPE
912 West Sixth Avenue
Anchorage, Alaska 99501
(907) 277-8611
Counsel for Appellants.

APPENDIX

APPENDIX I

THE SUPREME COURT OF THE STATE OF ALASKA

JACK VAN HYNING,	)	
	)	
Appellant.	)	
	)	File No. 4022
v.	)	
	)	OPINION
UNIVERSITY OF ALASKA,	)	
	)	
Appellee.	)	
	)	[No. 2267 - January 16, 1981]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage,
Mark C. Rowland, Judge.

Appearances: Robert H. Wagstaff, Wagstaff & Middleton, Anchorage, for Appellant. Sanford M. Gibbs, Hagans, Smith, Brown, Erwin & Gibbs, Anchorage, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Boochever, Burke and Matthews, Justices.*

MATTHEWS, Justice.

Jack Van Hyning was hired by the University of Alaska in the capacity of Assistant Professor of Fisheries Biology in June of 1967 for a 12 month term. This contract was renewed in 1968, 1969, 1970, and 1971. The University's tenure policy, incorporated into Van H[illegible]ng's contract, provides that if tenure is not granted at the end of a probationary period, not to exceed six years, a terminal contract may be offered to the

*This case was submitted to the court for decision prior to Justice Boochever's resignation.

probationary employee. One who has been denied tenure is thereafter ineligible for full-time employment at the University.

Briefly, the tenure policy calls for a multi-tiered evaluation of a candidate's effectiveness in teaching, research, intra-faculty relationships, participation in professional societies and service to the University and the general public. The process begins with the recommendation of the head of each faculty department as to each untenured person who has completed four years of service, and proceeds through the hands of the appropriate dean and vice president, finally reaching the university committee on tenure. This committee, composed of seven tenured faculty members elected by their peers, makes an independent evaluation of each tenure candidate. In addition to these written recommendations, the committee may request supplemental information from the applicant, his superiors, tenured colleagues or other persons. If the committee recommends to the president that tenure be denied, the applicant is entitled to notification of that decision. A person who is denied tenure during his fifth year of service may request reconsideration of his case by the president of the University.

In Van Hyning's case the committee recommended against granting tenure. He did not appear before the committee although he was entitled to.[1] The University stipulated that had Van Hyning requested to see the materials it considered in reaching its decision he would have been denied access. It stipulated further that had he so requested, he would have been denied the opportunity to question faculty members whom the committee interviewed in reaching its decision. No statement of reasons for recommending denial of tenure was provided. Van Hyning did not request the president to grant reconsideration of his case.

When the university president informed Van Hyning in April of 1972 of the tenure committee's decision, Van Hyning accepted a terminal contract and resigned effective June 30,

---

[1]Although we can find no such provision in the tenure policy, the parties stipulated that Van Hyning would have been entitled to appear before the tenure committee had he desired to do so.

1973. On May 27, 1976, he sued the University alleging violations of procedural due process in denying him tenure. The University's motion to dismiss under Alaska Rule of Civil Procedure 12 (b) (6)[2] was granted. The superior court found that the action lay in tort and not in contract, and was thus barred by the two year statute of limitations. Additionally, on the merits the court decided that no liberty or property interest was implicated by the denial of tenure and that plaintiff was not entitled to a due process hearing on the question of tenure. This appeal followed.

We conclude that the judgment should be affirmed because of Van Hyning's failure to exhaust his administrative remedies. "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37, 31 L.Ed.2d 17, 25 (1972). *See generally* 3 K. Davis, Administrative Law Treatise §§ 20.01-.10 (Supp. 1970). Here Van Hyning did not appear before the tenure committee and did not take his case to the president after the tenure committee had made its unfavorable recommendation. These failures deprived the University of the opportunity to take further action on his case which could have included a decision affording him tenure. Van Hyning argues that pursuing his remedy administratively any further than he did would necessarily have been futile, but this argument is unsupported in the record, and is essentially incapable of being verified since the effort was not in fact made.

If Van Hyning had promptly challenged the tenure committee's decision in court without first exhausting his administrative remedies, the court, in its discretion, might properly have required him to exhaust those remedies while retaining jurisdiction in the event that doing so did not bring

---

[2]The University's motion was treated as a motion for summary judgment under Alaska R. Civ. P. 56.

him acceptable relief.[3] However, when the court made its ruling such discretionary relief had become, in all probability, impractical[4] due to Van Hyning's four year delay in filing suit, because of intervening commitments made by the University and changes in personnel among the decision makers.

The judgment is AFFIRMED.

---

[3]*See* Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978).

[4]In Jerrell v. Kenai Peninsula Borough School District, 567 P.2d 760, 767 (Alaska 1977), we recognized the "practical concerns" of an educational institution relating to its ability "to effectively plan future hiring." "Prompt decisions on whether a teacher is to be retained are of considerable importance in determining the personnel to be hired for the ensuing school years."

APPENDIX II

UNIVERSITY OF ALASKA

FACULTY BULLETIN

No. 1970-71-5
January 27, 1971

Following review of the recommendation from the University Assembly concerning modification of the University Tenure Policy, the Board of Regents took action at their May and October 1970 meetings. The entire modified Tenure Policy is set forth herewith.

PROCEDURES FOR GRANTING TENURE

The primary function of a university is to provide for continual critical examination of the tenets of truth and for the preservation and extension of these tenets. To accomplish this function, the University must assemble a community of faculty and students, and must provide for them an environment that encourages free and honest inquiry, free expression of ideas, and the development of critical capacities. The primary purpose of a tenure policy is to assure the academic community of such an environment, one that will nurture the pursuit of knowledge, wisdom, and ultimately truth. Such a policy gives the faculty member freedom to teach and study, but it does not release him of his responsibility to maintain high standards of professional integrity and to contribute his maximum to the academic community.

I. UNIVERSITY COMMITTEE ON TENURE

A University Committee on Tenure will consider and advise the President on matters relating to tenure. This Committee shall be composed of seven tenured members of the faculty, chosen for their wisdom and maturity in professional matters. All committee members shall be of the rank of Associate Professor or above; their university duties shall be primarily in

teaching, research, public service, or professional-level service activity. They shall have had at least twelve years of academic experience, preferably at two or more institutions. Committee members shall be chosen for their professional maturity, rather than their affiliation with a particular discipline or administrative unit. They shall be elected for a term of three years by the University Assembly from a slate of candidates presented by a nominating committee selected from among eligible professional personnel of the University Assembly. The slate shall include at least two candidates for each vacancy on the Tenure Committee. Not more than two candidates shall be from the same college, institute, or other major administrative unit of the University. The Committee will elect its own chairman annually.

II. CONDITIONS FOR THE GRANTING OF TENURE

A. To be eligible for consideration for tenure, a person

1. must hold a full-time professional appointment, controlled by the University, and

2. must hold the rank of Assistant Professor or above (or its equivalent in research or service title), and

3. must hold a professional title apart from any administrative assignment, since eligibility for tenure does not extend to administrative positions.

B. Any member of the faculty who has not been offered tenure shall not be retained at the University of Alaska after six years of continuous, full-time service at the rank of Assistant Professor (or equivalent) or above. This provision does not apply to professional staff members whose duties are essentially administrative (less than 50% teaching, research, or public service) or to professional staff members who have attained academic rank other than through regular, systematic review procedures. Tenure in academic rank may be granted to administrative personnel when their qualifications for this assignment are established through regular channels. Tenure reviews will be rigorous, providing assurance that persons of doubtful qualifications will not be retained and that the University's needs are best met. In this way, the "tenure or out" policy will serve as an active force in the development and maintenance of excellence in faculty and programs.

Six years above the rank of Instructor (or equivalent) is a maximum probationary period; tenure may be offered by the President upon appropriate review after a 0-5 year period at the University. However, a person who has served a term of probationary service of more than three years in one or more institutions of higher learning should not be required to serve a probationary period of more than four years. The terms and conditions of every appointment to the faculty will be stated or confirmed in writing, and a copy of the appointment document will be supplied to the faculty member. Any subsequent extensions or modifications of an appointment, and any special understanding, or any notices incumbent upon either party to provide, will be stated or confirmed in writing and a copy will be given to the faculty member.

C. If tenure is offered but declined by a person, the terms of the tenure policy shall be deemed to have been fulfilled and the person may be retained.

D. Associate and Full Professors (or equivalent) who have received an unconditional seventh (or more) continuous contract by 1 July 1966 automatically will be deemed to have been offered tenure as of that date.

E. A faculty member shall be judged on the basis of his total potential contribution to the University when he is being reviewed for tenure. The following criteria will be considered, giving cognizance to the candidate's university assignment:

1. Effectiveness of Teaching: Scholarly level exhibited, creative preparation and presentation of materials, commitment to high academic standards, awareness of students' concerns, and the ability to stimulate and guide them to a high level of achievement; interest in developing methods for imparting the subject matter to the student; participation in curriculum development; recognition of the student as an individual; and effectiveness at individual counseling.

2. Effectiveness of Research: Scholarly level exhibited, commitment to high academic standards, original approach to problems, quality of published and unpublished contributions to knowledge, professional growth as reflected by publications and other creative work, recognition by his peers.

3. Effectiveness in professional-level service extending or supporting teaching or research. Demonstrated competence as an informal instructor or disseminator of information in special field; ability in motivating people to analyze and solve their own problems; appropriate academic background and evidence of continued professional growth; competence in working successfully with others on an individual basis; evidence of insight into community and state problems related to areas of University responsibility; recognition and respect for creative productivity and participation in significant activities of special professional field.

4. Other Criteria.

a. Personal relationships as a member of the faculty: Professional ethics and principles, judgment and tact, cooperativeness, resourcefulness, and responsibility.

b. Participation in professional societies of state or national scope; offices held, committee activities, addresses made.

c. University and public services: Committee work, administrative assignments, sponsoring of student organizations and projects; importance of service to the University, community, and the State.

III. PROCEDURES FOR THE GRANTING OF TENURE

A. The usual procedure for the initiation and processing of an application for tenure will be as follows:

1. Annually not later than 1 October each department head (or other appropriate administrative person) shall prepare a list of names of untenured persons in his department, or other administrative unit, who have completed their fourth year of eligible service. A copy of this list shall be forwarded to his dean or director and a copy to the cognizant vice president.

2. The department head will prepare, or cause to be prepared, a dossier setting forth the qualifications of each

such eligible person whom he intends to recommend (see Section II, "Conditions for the Granting of Tenure," for criteria). After consulting with senior members of his department as appropriate, he will forward this dossier, together with his recommendation and justification, to the appropriate dean or institute director no later than 15 November.

If the department head does not intend to recommend for tenure an eligible faculty member beginning his fifth year of continuous service, he shall prepare, no later than 15 October, a conditional memorandum to that effect, stating his reasons, and deliver the same through review counsel to the President.

3. The dean or institute director will add his recommendations and justifications to the dossier and forward the same to the appropriate vice president no later than 30 November.

4. The vice president will add his recommendations and justifications and forward the entire dossier to the President no later than 31 December.

5. The President will then seek from the University Committee on Tenure an independent evaluation on each candidate under consideration. He will provide the Committee with essential personnel records for review purposes.

6. The Committee will return the personnel records, together with its recommendations and justifications, to the President of the University no later than 1 February. If the Committee is not unanimously agreed on a recommendation, the vote, together with the reasons for the split vote, shall be included in the advisory recommendation.

7. As expeditiously as possible, the person concerned will be notified by the President of the decision on his case. However, notification will not be delayed beyond the date when new contracts are issued (normally about 30 March). The President will also notify both the vice presidents and the chairman of the Committee of his decision on each application; if the decision is contrary to the recommendations of the majority of the committee, he will state the reasons for his decisions.

8. At any stage in this procedure, the administrative officer or the Committee considering the application may request additional information from the person concerned, his administrative superiors, his tenured colleagues at the University of Alaska, or other qualified persons. However, such a request must not be allowed to delay the forwarding of the dossier according to the schedule outlined above.

B. Tenure applications may also be initiated by the individual concerned, the tenured faculty of the department, any administrator to whom the person is responsible, or the University Committee on Tenure. Such applications shall be forwarded through the normal channels as outlined in III A.

C. Under unusual circumstances, tenure applications may be initiated at times other than those indicated above. However, under such circumstances, the procedure outlined above will be followed, with appropriate changes in scheduled dates.

D. Tenure applications which have not been approved are subject to review without prejudice until the end of the fifth year of service.

A person who has been reviewed and not offered tenure during his fifth year of continuous service may request of the President reconsideration of his case.

IV. CONDITIONS FOR THE TERMINATION OF TENURE

A. Tenure will be terminated on 1 July following a faculty member's sixty-fifth (65) birthday. A faculty member over sixty-five (65) may continue to serve on an annual basis without tenure subject to approval by the President of the University.

B. A tenured faculty member may be terminated in case of prolonged medical disability, or financial exigency that prevents payment of salary. Should funds for the position vacated become available within two contract years following such termination for financial exigency the tenured faculty

member shall be invited to return. Should he decide not to accept the offer, he will immediately notify the University so that a suitable replacement may be made.

C. Except on the above grounds, termination of tenure shall be considered only in cases of dismissal for adequate cause.

A faculty member is to be considered for granting of tenure and dismissal for adequate cause in view of his professional integrity as a representative of his special field of qualification, of his profession, and of the University. The definition of adequate cause for dismissal cannot be made precise. The general areas of concern that obviously may generate charges sufficient for dismissal are unprofessional actions, unethical or immoral conduct, or professional incompetence. It is the responsibility of the University to dismiss for cause any member of its faculty who has lost his overall effectiveness in his University assignment as set forth in Section E of "Conditions for the Granting of Tenure."

V. PROCEDURES FOR THE DISMISSAL OF A TENURED FACULTY MEMBER FOR ADEQUATE CAUSE

A. The procedure to be followed in the event of dismissal of a tenured member for adequate cause shall be as follows:

1. Preliminary Proceedings: When the fitness of a faculty member is under question, the appropriate administrative officer shall ordinarily discuss the matter with him directly. If a mutually satisfactory adjustment of the matter does not result, the matter shall be referred to the University Committee on Tenure, augmented for this purpose by two administrative officers who are not immediately concerned with the case and who shall be appointed by the President. This augmented Committee shall make an informal inquiry, assist in arriving at an agreement if possible and, if none is effected, advise the appropriate administrative officer whether proceedings should be instituted toward a dismissal. If the appropriate administrative officer decides, either with or without the concurrence of the Committee, to begin proceedings, then he shall

formulate a statement setting forth the grounds proposed for dismissal, such statement to be presented to the augmented University Committee on Tenure.

2. Initiation of Formal Proceedings: The statement of the administrative officer shall then be incorporated in a letter from the president to the faculty member informing him that an inquiry to determine whether he should be removed from his faculty position on the grounds stated will be conducted by the augmented University Committee on Tenure, meeting at a specified time and place, sufficient time being allowed for the preparation of his defense, such period not to be less than 15 days. The faculty member shall be informed in detail of the procedural rights that will be accorded him, such as his right to counsel and the right to be informed completely of the evidence on which the grounds proposed for dismissal are based. In particular, the procedures specified in Section V.A. 4 below shall be made known to him. The faculty member shall reply to the President in writing whether he wishes a hearing at which he will be present and, if so, shall answer in writing, not less than one week before the date set for the hearing, the administrative officer's statement.

3. Suspension of the Faculty Member: Suspension of a faculty member during the proceedings against him may not be imposed unless it is necessary to avoid harm to individuals. Such suspension shall be with pay.

4. Proceedings of the augmented University Committee on Tenure: Committee considerations shall commence within 30 days after formal proceedings are initiated.

The Committee shall proceed by considering the statement of grounds for dismissal already formulated in the administrative recommendation for dismissal, said statement to be presented to the Committee together with the faculty member's response. If the faculty member has not requested a hearing, the Committee shall consider the case on the basis of available information and decide whether or not a hearing shall be held. Hearings shall be private unless the faculty member requests otherwise and the Committee concurs in the request. If any facts are in dispute, the testimony of witnesses

and other evidence concerning the charges shall be received. The administrative officer initiating the dismissal proceedings or his representative shall present the evidence for dismissal. The Committee shall determine the order of proof, normally conduct the questioning of witnesses, and, if necessary, assure the presentation of evidence.

The faculty member shall have the option of assistance by counsel. The faculty member shall have the aid of the Committee and of the President in securing the attendance of witnesses. The faculty member or his counsel and the administrative officer initiating the proceedings or his representative shall have the right, within reasonable limits, to question all witnesses who testify orally. The faculty member shall have the opportunity to be confronted by all witnesses adverse to him. If, in the judgment of the Committee, very unusual circumstances make this impossible, the identity of the witness, and his statements, shall be made known to the faculty member. Subject to these safeguards, statements may when necessary be taken outside the hearing and reported to it. All of the evidence shall be duly recorded. The record of the hearing shall be available to the faculty member. If a charge of incompetence is involved, testimony shall include that of teachers and other scholars in his discipline.

On the basis of the hearing the Committee shall reach its decision in conference, giving opportunity to the faculty member or his counsel and the administrative officer initiating the proceedings or his representative to summarize orally before it, and to submit written briefs if the Committee desires. The Committee shall then arrive at explicit findings with respect to each of the grounds for dismissal presented, and formulate its decision for or against removal of the faculty member. The President and the faculty member shall be notified in writing of the Committee's decision no later than 10 days after the close of the hearings. Each shall receive, as promptly as possible, and at the same time, a copy of the record of the hearing.

5. Decision by the President: A decision shall be rendered by the President no later than 15 days after notification by the Committee of their recommendation.

B. Public statements about the case by either the faculty member or administrative officers shall be avoided until the proceedings have been completed, except for such simple announcements as may be required concerning the time of the hearing and similar matters. Any release to the public shall be made through the President's Office.

VI. TERMINATION OF A NON-TENURED FACULTY MEMBER

Notice of non-reappointment, or of intention not to recommend reappointment shall be given in writing in accordance with the following procedures:

1. Not later than 1 March of the first academic year of service, if the appointment expires at the end of that year, or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

2. Not later than 15 December of the second academic year of service if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

3. At least twelve months before the expiration of an appointment after two or more years at the University.

VII. NOTICE BY FACULTY MEMBER OF INTENT TO LEAVE

A faculty member should give six months' notice of his intent to leave the University.

This memorandum supersedes those of the same subject dated March 4, 1966 and December 6, 1968.

/s/_____
William R. Wood
President

APPENDIX III

IN THE SUPREME COURT OF THE STATE OF ALASKA

JACK VAN HYNING,	)
	)
Appellant,	)
	)
v.	)
	)
UNIVERSITY OF ALASKA,	)
	)
Appellee.	)
	)

Supreme Court No. 4022

NOTICE OF APPEAL

COMES NOW Robert H. Wagstaff, counsel for Appellant and gives Notice of Appeal to the Supreme Court of the United States from this Court's Opinion of January 26, 1981, denial of rehearing of April 6, 1981, and subsequent Mandate dated April 7, 1981. This appeal is taken pursuant to 28 USC 1257 (2).

DATED at Anchorage, Alaska this 22nd day of June, 1981.

WAGSTAFF, MIDDLETON & POPE

By: s/
Robert H. Wagstaff

IN THE SUPREME COURT OF THE STATE OF ALASKA

JACK VAN HYNING,	)
	)
Appellant,	)
	)
v.	)
	)
UNIVERSITY OF ALASKA,	)
	)
Appellee.	)
	)

Supreme Court No. 4022

AFFIDAVIT OF MAILING

STATE OF ALASKA	)
	) ss.
THIRD JUDICIAL DISTRICT	)

ROBERT H. WAGSTAFF, of the law firm of WAGSTAFF, MIDDLETON & POPE, 912 W. Sixth Avenue, Anchorage, Alaska 99501, being first duly sworn deposes and says that on the 22nd day of June, 1981 he served a copy of the NOTICE OF APPEAL on:

Floyd Smith, Esq.
1345 W. 9th, Suite 201
Anchorage, Alaska 99501

Wilson L. Condon
Attorney General
420 L Street, Suite 100
Anchorage, Alaska 99501

by depositing said copies in the U.S. Mail, postage prepaid.

To counsel's knowledge these are all the persons who need to be served.

FURTHER affiant sayeth naught.

s/
Robert H. Wagstaff

SUBSCRIBED AND SWORN to before me this 22nd day of June, 1981.

s/
Notary Public in and for Alaska
My Commission Expires: 3-24-82

APPENDIX IV

IN THE SUPERIOR COURT OF THE STATE OF ALASKA

JACK VAN HYNING,	)	
	)	
Plaintiff.	)	
	)	
v.	)	
	)	
UNIVERSITY OF ALASKA,	)	
	)	
Defendant.	)	
	)	NO. 76-4288A

STIPULATED STATEMENT OF FACTS OF THE PARTIES

COME NOW the parties to this action and hereby stipulate and agree as follows:

1. Plaintiff, Jack Van Hyning was hired by the University of Alaska in June, 1967. At that time plaintiff was hired on a twelve month contract which was renewed for the following academic years of 1968, 1969, 1970 and 1971. During the period of time that he was employed at the University of Alaska, the plaintiff worked as an Associate Professor of Fisheries Biology. In April of 1972, plaintiff was informed that he would not receive tenure at the University of Alaska. Pursuant to the policies of the University of Alaska plaintiff was given a terminal contract for the following academic year. Plaintiff resigned from the University of Alaska effective June 30, 1973, upon the recommendation of his Dean, but this was not an official recommendation of the University of Alaska but was entirely personal. At all times while plaintiff was employed at the University a formal tenure system was in effect. This system provided that if tenure was not granted at the end of a designated period that a terminal contract would

be provided and that thereafter the unsuccessful applicant would not be eligible for further full-time employment at the University. When plaintiff's tenure review was held the tenure committee recommended against granting tenure and the President at the University accepted the recommendation. Plaintiff did not appear in front of the tenure committee although he had the right to do so. The tenure committee reviewed written materials provided it and interviewed other faculty members familiar with plaintiff's work. Had plaintiff sought access to these materials or requested to be present during the interviews, his requests would have been denied. Had the plaintiff sought to "cross-examine" faculty members appearing before the committee that right would not have been granted since the tenure committee does not feel it is an "adversary proceeding." No statement of specific reasons for the denial of tenure was given.

Following his being informed that he would be denied tenure plaintiff did not appeal the decision of the University. Plaintiff did not seek within the University of Alaska, any review of the decision concerning tenure with the exception that plaintiff requested further information from his Dean.

The Parties further stipulate and agree that the following paragraphs, as modified, of plaintiff's complaint are true:

I.

Plaintiff is an experienced, professional biologist with a doctorate degree in fisheries biology obtained in 1968 from Oregon State University. Prior to the events herein described he enjoyed a good reputation in his field.

II.

On or about June 13, 1967, plaintiff was hired by defendant on a twelve month contract to be Associate Professor of Fisheries Biology at the University of Alaska in Fairbanks.

III.

The contract was renewed for the succeeding academic years 1968, 1969, 1970 and 1971.

IV.

Under the terms of the University of Alaska Faculty Bulletin No. 1970-71-5 dated January 27, 1971, any member of the University of Alaska faculty who had not been offered tenure shall not be retained at the University of Alaska after six years of continuous fulltime service at the rank of assistant professor or above. The policy explicitly provides that tenure reviews will be rigorous providing assurance that persons of doubtful qualifications will not be retained and that the University's needs are best met. The Tenure Committee is to make appropriate recommendations to the President of the University.

V.

In April of 1972 plaintiff was informed that he was being denied tenure by the President of the University of Alaska, William R. Wood, upon the recommendation of the Tenure Committee.

VI.

As the direct and proximate result of plaintiff's being denied tenure he resigned from the University of Alaska effective June 30, 1973 in an effort to reduce the professional impact of the denial of tenure. Accordingly, plaintiff stopped teaching at the University of Alaska on June 30, 1973.

ISSUES PRESENTED

(1) Was the University of Alaska required to provide Jack Van Hyning with a due process hearing concerning its refusal to grant him tenure either before or after that decision was reached.

(2) If plaintiff has stated a cause of action, is that cause of action barred by the Statute of Limitations.

(3) If plaintiff prevails on his claim on the merits, is he enti tled to damages in the nature of back wages only if he is granted tenure after a due process hearing.

DATED at Anchorage, Alaska this 19th day of October, 1977.

HAGANS, SMITH, BROWN, ERWIN & GIBBS

BY: s/_____
FLOYD V. SMITH
Counsel for Defendant

WAGSTAFF & MIDDLETON

BY: s/_____
ROBERT WAGSTAFF
Counsel for Plaintiff

Office-Supreme Court, U.S.
FILED
AUG 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-35

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

JACK VAN HYNING,

Appellant,

v.

UNIVERSITY OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

MOTION BY APPELLEE TO DISMISS APPEAL

TERRANCE A. TURNER
OWENS & TURNER, P. C.
425 "G" Street, Suite 920
Anchorage, Alaska 99501
(907) 276-3963
Counsel for Appellee.

Anchorage, Alaska • Ken Wray's Print Shop, Inc. • (907) 276-4535

QUESTION PRESENTED

Should this appeal from the Alaska Supreme Court be dismissed on the grounds: (1) that the judgment appealed from rests on an adequate non-federal basis; and (2) that the federal question sought to be reviewed was not properly raised before and passed upon by the Alaska Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF CASES AND AUTHORITIES iii
INTRODUCTION 1
STATEMENT OF CASE
I. FACTUAL BACKGROUND 1
II. PROCEDURAL BACKGROUND 4
APPLICABLE STANDARD OF REVIEW
I. GENERAL PRINCIPLES OF SUPREME COURT REVIEW 5
II. APPLICATION OF STATE PROCEDURE TO FEDERAL CLAIMS 5
ARGUMENTS
I. THE ALASKA SUPREME COURT'S FAILURE TO ADDRESS VAN HYNING'S FEDERAL CONSTITUTIONAL CLAIMS WAS BASED UPON INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUNDS 7
II. THE RECORD ON APPEAL IS INSUFFICIENT TO DECIDE APPELLANT'S FEDERAL CONSTITUTIONAL CLAIMS BASED UPON THE ROTH AND SINDERMANN CASES RELIED UPON 10
A. SUMMARY OF THIS COURT'S HOLDING IN ROTH 11
B. SUMMARY OF THIS COURT'S HOLDING IN SINDERMANN 12
C. THIS CASE IS SIMILAR TO ROTH AND DISTINGUISHABLE FROM SINDERMANN 13
III. IF THIS COURT CONCLUDES THAT THE ALASKA SUPREME COURT WRONGFULLY DECLINED TO ADDRESS VAN HYNING'S FEDERAL CONSTITUTIONAL CLAIMS BELOW, IT SHOULD REMAND BACK TO THE ALASKA COURT FOR CONSIDERATION OF A FURTHER DISPOSITIVE ISSUE OF STATE LAW 15
CONCLUSION 17
APPENDIX
I. OPINION OF ALASKA SUPREME COURT 1a
II. UNIVERSITY OF ALASKA FACULTY BULLETIN NO. 1970-71-5 ..... 5a

TABLE OF CASES AND AUTHORITIES

Cases Relied Upon: *Page*

Board of Regents v. Roth, 408 U.S. 564 (1972) 10
Bouie v. City of Columbia, 378 U.S. 347 (1964) 6
Davis v. Wechsler, 263 U.S. 22 (1923) 6
Goldberg v. Kelly, 397 U.S. 254 (1970) 9
Gusik v. Schilder, 340 U.S. 128 (1950) 7
Hamilton v. Regents of University of California, 293 U.S. 245 (1934) 5
Harris County Comm'rs. Court v. Moore, 420 U.S. 77 (1975) 17
Holman v. Califano, 83 F.R.D. 488 (M.D. Pa. 1979) 9
Jerrell v. Kenai Peninsula Borough School District, 567 P.2d 760 (Ak. 1977) 7
Matthews v. Eldridge, 424 U.S. 319 (1976) 8
Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978) 7
Orr v. Orr, 440 U.S. 268 (1979) 16
Parisi v. Davidson, 405 U.S. 34 (1972) 7
Patten v. New York, 445 U.S. 573 (1980) 7
Perkins v. Regents of University of California, 353 F. Supp. 618 (C.D. Calif. 1973) 15
Perry v. Sindermann, 408 U.S. 593 (1972) 11, 17
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 7
Rogers v. Alabama, 192 U.S. 226 (1904) 6
Sament v. Hahnemann Medical College and Hospital, 413 F. Supp. 434 (E.D. Pa 1976) 4
Staub v. City of Baxley, 355 U.S. 313 (1958) 6
Sullivan v. Pacific and Arctic Rwy. and Nav. Co., 439 F.2d 267 (9th Cir. 1971) 8
Ward v. Love County, 253 U.S. 17 (1920) 16
Whelchel v. McDonald, 340 U.S. 322 (1950) 7
Wolfe v. North Carolina, 364 U.S. 177 (1960) 5,6

Rules Relied Upon:

Supreme Court Rule 16.1(b) 1, 17
Supreme Court Rule 17.1(c) 1, 18

Fed. R. Civ. Pro. 56(c) 4
Ak. R. Civ. Pro. 12(b)(6) 4
Ak. R. Civ. Pro. 56(c) 4
Statutes Relied Upon:
28 U.S.C. §1257(2) 5
42 U.S.C. §301, §423, et seq. 8
AS 09.10.050 4
AS 09.10.070 ..... 4, 16
Treatises Relied Upon:
3 Davis, Administrative Law Treatise §§20.00-.00-1 (Supp. 1980) 9, 10
3 Davis, Administrative Law Treatise §§20.01-.10 (Supp. 1970) 8
Wright and Miller, Federal Practice & Procedure §4019 (1977) 5
Wright and Miller, Federal Practice & Procedure §4021 (1977) 5
Wright and Miller, Federal Practice & Procedure §4021-28 (1977) 6
Wright and Miller, Federal Practice & Procedure §4023 (1977) 6
Wright and Miller, Federal Practice & Procedure §4024 (1977) 6
Wright and Miller, Federal Practice & Procedure §4028 (1977) 6

No. 81-35

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

JACK VAN HYNING,

Appellant,

v.

UNIVERSITY OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

MOTION BY APPELLEE TO DISMISS APPEAL

INTRODUCTION

This case involves an appeal from an opinion of the Alaska Supreme Court (not yet reported; appears in Appendix I), announced January 26, 1981. Rehearing in this case was denied by the Alaska Court on April 6, 1981, and mandate issued April 7, 1981.

The Alaska Court held that, because appellant, Jack Van Hyning — a former member of the faculty at appellee, University of Alaska — failed to properly exhaust his administrative remedies following an adverse tenure decision, it would not address appellant's federal constitutional claim that he was denied due process of law under the procedure pursuant to which he was denied tenure.

Appellee hereby moves to dismiss this appeal on the grounds: (1) that the judgment of the Alaska Court rests on an adequate non-federal basis; and (2) that the federal question sought to be reviewed was not properly raised before and passed upon by the Alaska Court. Supreme Court Rule 16.1(b).

Appellee also requests that this Court deny appellant's alternative petition for certiorari on the grounds: (1) that no substantial federal question meriting plenary consideration by this Court has been raised by appellant; and (2) that the Alaska Court below did not address the federal questions presented to this Court. Supreme Court Rule 17.1(c).

Alternatively, in the event that this Court notes jurisdiction or possible jurisdiction or is inclined to grant certiorari, this Court should remand the case back to the Alaska Court for consideration of (a) a further dispositive issue of state law and (b) the federal questions raised by appellant.

STATEMENT OF CASE

I. FACTUAL BACKGROUND.

Jack Van Hyning, Ph.D. (hereinafter "Van Hyning"), was hired by the University of Alaska (hereinafter "U of A") as an associate professor of fisheries biology for the 1968 academic

year under a one-year contract of employment. [R. 155] Van Hyning's contract of employment was renewed by the U of A on an annual basis thereafter for the 1969-73 academic years. [R. 155]

No representations concerning Van Hyning's continued employment with the U of A were ever made by the U of A to Van Hyning. [R. 157] And Van Hyning was well aware of the probationary status of his employment. [R. 157]

A tenure system was in effect during Van Hyning's entire employment with the U of A which was formalized in January, 1971. [R. 155] If tenure was not offered to a faculty member by the end of his sixth year of probationary employment, he would no longer be retained on a full-time basis, but remained eligible for rehire on a part-time basis. [R. 155]

The U of A's tenure system was premised upon the following general policy:

> "Tenure reviews will be rigorous, providing assurance that persons of doubtful qualifications will not be retained and that the University's needs are best met. In this way, the 'tenure or out' policy will serve as an active force in the development and maintenance of excellence in faculty and programs." [Appendix II, at 6a]

Tenure decisions at the U of A followed a multi-tiered evaluation of each faculty candidate's effectiveness in teaching, research, faculty relationships, professional societies, and university and public services. [Appendix II, at 7a-10a] The evaluation process began after the completion of the candidate's fourth year of eligible service. [Appendix II, at 7a] The first step in the process was a review of and recommendation on the candidate by the head of his faculty department, followed by similar reviews and recommendations by the appropriate deans and vice president. [Appendix II, at 8a-9a] The next step was a review by the U of A committee on tenure, which was comprised of faculty members elected by their peers. [Appendix II, at 5a-6a, 9a-10a]

The tenure committee made an independent evaluation of each candidate based upon such reviews and recommenda-

tions and such supplemental information as the committee deemed appropriate. [Appendix II, at 9a-10a] The committee then made a recommendation to the U of A president as to whether tenure should be offered to the candidate, and the president notified the candidate of his decision. [Appendix II, at 9a] A candidate who was denied tenure during his fifth year of service could request reconsideration of the decision by the president and appeal the result to the Grievance Committee of the University Assembly. [Appendix II, at 10a; Appellant Jack Van Hyning's Supplemental Brief as to the Exhaustion of Administrative Remedies Below, filed with the Alaska Supreme Court, at 2]

Near the end of Van Hyning's fifth year of service with the U of A, he was informed by the U of A president that he would not be offered tenure based upon the recommendation of the tenure committee. [R. 155] Van Hyning never requested any statement of reasons for the denial of tenure to him; nor was one given to him. [R. 156]

Van Hyning declined to seek an appearance before the tenure committee to present information on his behalf. [R. 156] Van Hyning also declined to exercise his rights to request reconsideration of the tenure decision by the U of A president and to appeal the tenure decision to the U of A Grievance Committee. [R. 156; Appellant Jack Van Hyning's Supplemental Brief as to the Exhaustion of Administrative Remedies Below, filed with the Alaska Supreme Court, at 2]

Van Hyning neither sought nor had the right to inspect any information which the tenure committee considered in making its recommendation to the president. [R. 156] Nor did Van Hyning seek or have the right to cross-examine faculty members whom the tenure committee had interviewed. [R. 156]

Following the denial of tenure, Van Hyning accepted a terminal one-year contract of employment with the U of A and thereafter voluntarily resigned from the U of A faculty effective June, 1973. [R. 155] However, Van Hyning has continued since then to teach on a part-time basis at the U of A. [R.

36-37] Van Hyning never applied for employment at any other academic insitution following his resignation from the U of A. [R. 34]

II. PROCEDURAL BACKGROUND.

In May, 1976 — four years after he was denied tenure by the U of A — Van Hyning filed suit against the U of A in the Alaska Superior Court, claiming that the U of A tenure procedure violated his state and federal due process rights. The U of A responded by filing a motion to dismiss all of Van Hyning's claims under Ak. R. Civ. Pro. 12(b)(6). This motion was, in effect, treated by the trial court as a motion for summary judgment, because additional evidence was submitted by both parties. *Compare* Ak. R. Civ. Pro. 56(c) *with* Fed. R. Civ. Pro. 56(c); *see Sament v. Hahnemann Medical College and Hospital*, 413 F. Supp. 434, 442-43 (E.D. Pa. 1976).

The trial court granted the U of A's motion on the grounds: (1) that all of Van Hyning's claims were barred by the applicable state statute of limitations, AS 09.10.070, because he did not file his suit against the U of A within the requisite two-year time period; and (2) that the U of A's denial of tenure to Van Hyning did not deny him any liberty or property interests in violation of his state or federal due process rights.

Van Hyning appealed the trial court decision to the Alaska Supreme Court, contending: (1) that a six-year statute of limitations, AS 09.10.050, rather than the two-year statute of limitations, was controlling in this case; and (2) that the U of A's tenure procedure violated his state and federal due process rights. Following the completion of briefing, the Alaska Court ordered supplemental briefing, *sua sponte*, on the issue of whether Van Hyning had properly exhausted his administrative remedies prior to bringing suit against the U of A.

Following such supplemental briefing, the Alaska Supreme Court ruled that Van Hyning had failed to properly exhaust his administrative remedies before bringing the case, because: (1) he did not request any appearance before the tenure committee; and (2) he did not request reconsideration of the adverse

tenure decision by the U of A president. Such grounds being adequate to dispose of all of Van Hyning's claims, the Alaska Court declined to address either the due process or statute of limitations issues that were relied upon by the trial court.

APPLICABLE STANDARD OF REVIEW

I. GENERAL PRINCIPLES OF SUPREME COURT REVIEW

This Court has the jurisdiction to review final decisions by the highest courts of states which uphold the validity of state statutes against federal claims. 28 U.S.C. §1257(2). Such jurisdiction has even been construed to apply to state court decisions upholding administrative orders which are legislative in character. *Hamilton v. Regents of University of California,* 293 U.S. 245, 257-58 (1934).

However, this Court will usually decline to review state decisions on federal questions if such decisions are supported by independent and adequate state procedural grounds. Wright and Miller, *Federal Practice & Procedure* §4019, at 661-62 (1977).

> "The Supreme Court retains jurisdiction and authority to determine whether federal law should displace state law generally on a given matter; to determine whether there is any possible outcome of a federal issue that would require a different result than state grounds; and to determine the adequacy of state grounds that, if adequate, would independently sustain the judgment." Wright and Miller, *Federal Practice & Procedure* §4021, at 695-96 (1977); *see Wolfe v. State of North Carolina,* 364 U.S. 177, 186 (1960).

II. APPLICATION OF STATE PROCEDURE TO FEDERAL CLAIMS.

These general principles of review require a two-step analysis: (1) Did the highest court of the state finally decide the matter on the basis of state law independent from the asserted federal claims? (2) Were those independent state grounds adequate?

Under the first step of the analysis, state procedural rules are no less applicable in state courts when federal rights are in controversy than when state law is controlling. *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); Wright and Miller, *Federal Practice & Procedure* §4023, at 706 (1977).

> "Once an effective remedy is made reasonably available, state procedural limitations remain generally independent of the federal law, and need only survive the basic test of adequacy." Wright and Miller, *Federal Practice & Procedure* §4024, at 725 (1977).

Under the second step of the analysis, state courts may decide cases on adequate state procedural grounds, but such decisions may not avoid federal claims on the basis of non-federal grounds: (1) which lack "fair or substantial support," *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960); (2) which violate federal due process standards, *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964); (3) which constitute an "evasion" of federal rights, *Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904); (4) which interpose "unreasonable obstacles" to the assertion of federal rights, *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923); (5) which "discriminate" against federal rights, *Wolfe v. North Carolina*, 364 U.S. 177, 192 (1960); or (6) which constitute an "arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). *See, generally*, Wright and Miller, *Federal Practice & Procedure* §4021-28 (1977).

Despite these numerous tests for the review of state court decisions, this Court has traditionally awarded great deference to the independence of state procedure. And the general standard of review of such cases by this Court

> "is that state procedure may be followed so long as it affords a reasonable opportunity to assert federal rights." Wright and Miller, *Federal Practice & Procedure* §4028, at 747 (1977).

ARGUMENTS

I. THE ALASKA SUPREME COURT'S FAILURE TO ADDRESS VAN HYNING'S FEDERAL CONSTITUTIONAL CLAIMS WAS BASED UPON INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUNDS.

The Alaska Supreme Court declined to address Van Hyning's federal due process claims because he failed to comply with the state procedural requirement that he first duly exhaust all available administrative remedies before commencing suit to vindicate such rights.

According to the Alaska Court: (a) Van Hyning's failure to exhaust his administrative remedies deprived the U of A of an opportunity to take further administrative action that might have resulted in a different tenure decision; (b) Van Hyning's contention that any further administrative action would have been "futile" was unsupported by the record on appeal and essentially incapable of verification; and (c) Van Hyning's lengthy delay in filing suit deprived the trial court of an opportunity to retain jurisdiction and remand the case for exhaustion of administrative remedies, due to intervening commitments by the U of A and personnel changes in the tenure committee. *See Gusik v. Schilder,* 340 U.S. 128, 133-34 (1950); *Whe[illegible]hel v. McDonald,* 340 U.S. 322, 326 (1950); *Montgomery v. Rumsfeld,* 572 F.2d 250, 253-54 (9th Cir. 1978); *Jerrell v. Kenai Peninsula Borough School District,* 567 P.2d 760, 767 (Ak. 1977).

Under such circumstances, the Alaska Court's election to raise the exhaustion of administrative remedies issue *sua sponte* and, after adequate opportunity for briefing, to decide the case on that issue, properly fell within its discretionary limits. The raising of a determinative issue *sua sponte* by an appeals court is generally accepted appellate practice. *See Patten v. New York,* 445 U.S. 573, 582 n.19 (1980). And the doctrine of exhaustion of administrative remedies is a generally accepted principle of both Alaska and federal law. *See, e.g., Parisi v. Davidson,* 405 U.S. 34, 37 (1972); *Republic Steel Corp.*

v. Maddox, 379 U.S. 650, 652-53 (1965); *Sullivan v. Pacific and Arctic Rwy. and Nav. Co.*, 439 F.2d 267, 273-74 (9th Cir. 1971) (applying Alaska law); 3 Davis, *Administrative Law Treatise* §§20.01-.10 (Supp. 1970).

No reported cases have been discovered where this Court has considered the omission of a state court to pass on a federal claim based upon the claimant's failure to exhaust his administrative remedies. However, in *Matthews v. Eldridge*, 424 U.S. 319 (1976), this Court recently considered a federal district court's application of the exhaustion doctrine in a suit challenging the constitutionality of the administrative procedure for terminating disability benefits under Title II of the Social Security Act, 42 U.S.C. §301, §423, *et seq.*

In *Eldridge* the entitlement of a disability benefit claimant (Eldridge) was reviewed by the state agency charged with monitoring his medical condition. After considering medical information obtained from Eldridge, the state agency made a determination of non-disability. This determination was accepted by the Social Security Administration, which had been delegated authority to do so by the Secretary of Health, Education and Welfare. The Social Security Administration notified Eldridge that his benefits would be terminated, but that he had the right to seek reconsideration of that determination by the state agency. Instead of requesting reconsideration, Eldridge immediately commenced suit in federal district court against the Secretary, challenging the constitutionality of the benefit-termination procedures established by the Secretary and seeking immediate reinstatement of his benefits pending a full evidentiary hearing on the issue of his disability. 424 U.S. at 324-25.

The Secretary moved to dismiss Eldridge's claims on the grounds: (1) that his benefits had been terminated in accordance with valid administrative regulations and procedures; and (2) that he had failed to exhaust available administrative remedies. In response, the district court held that, prior to terminating Eldridge's federal disability benefits, the state agency charged with administering the program had to afford him a full evidentiary hearing of the type required for welfare

beneficiaries under Title IV of the Social Security Act. *Compare Goldberg v. Kelly*, 397 U.S. 254, 266-271 (1970). The district court's decision was affirmed on appeal by the Fourth Circuit. This Court reversed, holding that a full evidentiary hearing was not required prior to terminating disability benefits. 424 U.S. at 349.

In reaching this decision, this Court concluded that the denial of Eldridge's benefit claim constituted a final administrative decision sufficient to permit federal court review of his constitutional claims. 424 U.S. at 328. This Court also stated that Eldridge was not required to further exhaust the additional administrative remedies available to him because: (1) his constitutional claim was entirely collateral to his substantive claim of disability benefit entitlement; and (2) he had raised at least a colorable claim that an erroneous denial of disability benefits to him would damage him in a way not recompensable through retroactive benefit payments. 424 U.S. 319, 330-31; *see Holman v. Califano*, 83 F.R.D. 488, 491 (M.D. Pa. 1979).

This Court's decision in *Eldridge* was obviously dictated in large part by the particular exigencies of Eldridge's disability compensation needs, because it was reached *despite:* (1) this Court's express acknowledgment that exhaustion of administrative remedies was a "jurisdictional prerequisite" to judicial review, 424 U.S. at 327; (2) this Court's observation that the administrative agency may have found favorably for Eldridge upon reconsideration, 424 U.S. at 346-47; (3) this Court's conclusion that the Secretary did not waive the exhaustion requirement, 424 U.S. at 328; and (4) this Court's many precedents requiring exhaustion. *See, generally*, 3 Davis, *Administrative Law Treatise* §§20.00-.00-1 (Supp. 1980).

Van Hyning's circumstances are distinguishable from the exigent factual situation that led to this Court's decision in *Eldridge*. While Van Hyning's constitutional challenge to the U of A tenure system may be collateral to his substantive claim of tenure entitlement, he has failed to raise any "colorable claim" that an erroneous tenure decision by the U of A would damage him in a way not recompensable through

retroactive relief. Unlike Eldridge, Van Hyning is not seeking to prevent the loss of a vested benefit (disability payments) upon which he relies, but rather is seeking a benefit (tenure) to which he believes he is entitled.

A denial of disability benefits is also hardly analogous to a denial of tenure, because there is not the same urgency for judicial review of an adverse tenure decision as there is for judicial review of a denial of disability benefits. While Eldridge sought and argued that he required immediate judicial relief from the adverse disability benefit decision that he suffered, Van Hyning waited over four years to seek judicial review of the adverse tenure decision that he suffered. Van Hyning also failed to demonstrate that he would be irreparably harmed if he did not bypass the final administrative reconsideration procedure and go directly to court, as Eldridge did.

Finally as noted above, this Court traditionally defers whenever possible to the application of adequate state procedure to independently dispose of federal claims. Such deference would be particularly appropriate in the present case, because it involves the application of state procedure to federal claims, while *Eldridge* involved the application of federal procedure to federal claims. This Court should, therefore, defer to the Alaska Supreme Court's application of state procedure in this case, unless it is willing to categorically determine that such procedure, as applied in this case, violated federal due process standards. To do otherwise would unreasonably extend the narrow holding of *Eldridge* and impair the credibility of the doctrine of exhaustion of administrative remedies. *See* 3 Davis, *Administrative Law Treatise* §§20.00-.00-1 (Supp. 1980).

II. THE RECORD ON APPEAL IS INSUFFICIENT TO DECIDE APPELLANT'S FEDERAL CONSTITUTIONAL CLAIMS BASED UPON THE ROTH AND SINDERMANN CASES RELIED UPON.

All of Van Hyning's federal constitutional claims are based upon two seminal decisions of this Court, *Board of Regents v.*

Roth, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). In these cases, this Court considered the fundamental question of whether a decision not to renew an employment contract of a non-tenured university professor without a sufficient hearing violated the professor's due process rights under the Fourteenth Amendment.

A. SUMMARY OF THIS COURT'S HOLDING IN ROTH.

Roth involved a university professor (Roth) who had been hired for a fixed one-year academic term. Upon completion of that year of employment, Roth was notified that he would not be rehired for the succeeding academic year. Roth had no tenure rights.

On appeal to this Court, Roth argued that the university's failure to accord him a hearing prior to the non-renewal of his employment contract deprived him of property and liberty interests guaranteed by the Fourteenth Amendment. In addressing Roth's claim, this Court first considered whether Roth's interests in his continued employment with the university were protected by the Fourteenth Amendment.

> "To have a property interest [protected by the Fourteenth Amendment] in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577.

This Court then went on to hold that whatever property interests Roth had in his continued employment with the university were created by state law or by the terms of his faculty appointment by the university.

No state statute, university rule or policy secured any interest in Roth's reemployment or gave rise to any legitimate expectation by Roth that he would be reemployed at the end of his initial one-year term. And no provision in Roth's appointment to the university faculty provided for the renewal of his employment with the university after his initial one-year contract expired. As a result, this Court concluded that Roth did not have a sufficient property interest in his continued

employment with the university to require that the university give him a full evidentiary hearing prior to declining to renew his contract of employment. 408 U.S. at 578.

In arriving at this decision, this Court noted that, had the university made a charge against Roth bringing into issue his good name, reputation, honor or integrity in connection with the non-renewal of his contract, it might have decided the case differently.

> "For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' . . . In the present case, however, there is no suggestion whatever that [Roth's] 'good name, reputation, honor, or integrity' is at stake." 408 U.S. at 573 (footnotes and citations omitted).

This Court also noted that the State's declination to re-employ Roth did not adversely impact his future career interests and employment opportunities.

> "Similarly, there is no suggestion that the State, in declining to re-employ . . . [Roth], imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573.

This Court then went on to criticize unwarranted assumptions by the District Court and Court of Appeals below to the effect that the mere non-retention of Roth by the university had created such an adverse inference or impact. 408 U.S. at 574 n.13.

> "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." 408 U.S. at 575.

B. SUMMARY OF THIS COURT'S HOLDING IN SINDERMANN

Sindermann involved the non-retention of a professor

(Sindermann) who had been employed by the Texas state college system for ten consecutive years. During his employment, Sindermann became involved in a series of public disagreements with the policies of the board of regents.

At the end of his tenth year of employment, Sindermann was notified by the board of regents that his contract would not be renewed for the succeeding academic year. This notice was accompanied by a press release by the board alleging insubordination by Sindermann. Sindermann was allowed no opportunity for any hearing to rebut the allegations of misconduct.

On appeal to this Court, Sindermann claimed that the board of regent's failure to provide him with a full evidentiary hearing on his non-retention violated his due process rights under the Fourteenth Amendment. At the core of his claims was an allegation that the non-renewal of his contract was in reprisal for the exercise of his constitutionally protected right of free speech to criticize the board. 408 U.S. at 598. As a result, this Court concluded that Sindermann had stated a bona fide federal constitutional claim concerning deprivation of his free speech rights.

The college that employed Sindermann had no formal tenure system, but had created an implied tenure system which Sindermann and other faculty members could have relied upon to form a legitimate expectation of continued employment. As a result, this Court held that Sindermann could have had more than a mere subjective expectation of continued employment and remanded the case back to the state court for a determination as to whether, under applicable state law, Sindermann had a property interest in his continued employment. 408 U.S. at 602-03.

C. THIS CASE IS SIMILAR TO ROTH AND DISTINGUISHABLE FROM SINDERMANN.

The record on appeal in this case clearly indicates that, like in *Roth*, the U of A made no charges against Van Hyning in denying him tenure that placed his good name, reputation, honor

or integrity in issue or seriously damaged his standing and associations in his community. Nor does the record in this case contain any suggestion or proof to the effect that Van Hyning suffered any stigma or other disability that foreclosed his freedom to take advantage of other career and employment opportunities.

On the contrary, the record in this case demonstrates that Van Hyning has never even applied for similar full-time employment at any other academic institution and has continued to work at the U of A on a part-time basis since the U of A's denial of tenure to him. Van Hyning's claim that no other commensurate employment is available at any other university in Alaska also lacks support in the record. And, even if such claim were true, it is not a sufficient reason to require the U of A to afford him a full evidentiary hearing prior to denying him tenure, because such a requirement would condition the granting of due process rights on the availability of similar employment elsewhere.

Nor does the U of A tenure policy provision that it "will be rigorous, providing assurance that persons of doubtful qualifications will not be retained" or the provision that the policy is based upon a "tenure or out" premise, without further support in the record, support Van Hyning's contention that the U of A's denial of tenure to him implied that he was incompetent, any more than mere non-retention implies severe career difficulties or a lack of future employment opportunities. *See* 408 U.S. at 574 n.13. And, despite Van Hyning's urging to the contrary, no more than a semantical distinction can be made between a denial of tenure which results in non-retention and a non-retention without a tenure decision.

Further, this Court did *not* hold in *Sindermann* or *Roth* that an inference of a legitimate expectation of continued employment can be drawn from the mere fact of employment for a number of years as a non-tenured professor. As a result, no legitimacy may be accorded to Van Hyning's argument that he had a full expectation of continued employment with the U

of A, because he suffered no contrary indication and his contract was renewed on an annual basis for five consecutive years prior to the adverse tenure decision.

Since the U of A, unlike Sindermann's college, had an express tenure system, Van Hyning also cannot claim that tenure may have been conferred upon him on a *de facto* basis, as did Sindermann. Unlike in *Sindermann*, the record on appeal in this case is totally devoid of any contractual terms or university rules, practices or standards which would have given Van Hyning a sufficiently objective expectation of continued employment to create a property interest.

The record in this case is devoid of any proof to the effect that Van Hyning's expectation of tenure was anything more than a unilateral one. Nor is there any evidence that tenure offers, rather than denials, were generally expected by faculty members at the U of A in Van Hyning's position at the time tenure was denied him. There is also no proof whatsoever in the record that Van Hyning suffered any damage to his career interests or lost any future employment opportunities as a result of U of A's denial of tenure to him. As this Court pointed out in *Roth*, such an assumption may not be made without proof in the record to the contrary, 408 U.S. at 574 n.13; and a person is not deprived of any federal constitutional rights when he is merely not rehired in one job and remains free to seek another, 408 U.S. at 575.

In sum, the record on appeal fails to support the federal constitutional claims raised by Van Hyning. To reach such claims, this Court would be required to draw inferences and make factual findings which are unwarranted based upon the record on appeal. A firmer factual basis than naked unsupported allegations by a claimant is required to support constitutional litigation. *Perkins v. Regents of University of California*, 353 F. Supp. 618, 622 (C.D. Calif. 1973).

III. IF THIS COURT CONCLUDES THAT THE ALASKA SUPREME COURT WRONGFULLY DECLINED TO ADDRESS VAN HYNING'S FEDERAL CONSTITUTIONAL CLAIMS BELOW, IT SHOULD REMAND

BACK TO THE ALASKA COURT FOR CONSIDERATION OF A FURTHER DISPOSITIVE ISSUE OF STATE LAW.

The trial court below held that all of Van Hyning's federal constitutional claims were barred by the applicable state statute of limitations, AS 09.10.070, because he did not file suit within the requisite two-year time period. Even though the statute of limitations was dispositive of all of Van Hyning's claims, the trial court went on to conclude that the U of A's denial of tenure to him did not deny him any liberty or property interests in violation of his federal or state due process rights.

When Van Hyning appealed the trial court's decision to the Alaska Supreme Court, the Alaska Court affirmed the decision without approving the trial court's reasoning, concluding that all of Van Hyning's claims were barred because he had failed to exhaust his administrative remedies prior to bringing suit. In doing so, the Alaska Court did not address the state statute of limitations issue, which was also dispositive of all of Van Hyning's claims.

This Court has observed that a state court may deny a federal claim on the basis of a state statute of limitations. *Ward v. Love County*, 253 U.S. 17, 25 (1920). As a result, assuming, *arguendo*, that the Alaska Supreme Court wrongfully avoided Van Hyning's federal claims by applying the doctrine of exhaustion of administrative remedies, the issue of whether such claims are barred by the applicable state statute of limitations must still be considered before this Court addresses the merits of Van Hyning's federal claims.

In *Orr v. Orr*, 440 U.S. 268, 274-75 (1979), this Court assumed that a state appeals court had rejected a state statute of limitations defense to certain federal constitutional claims based upon the fact that the state court had addressed the merits of such claims. In dissent, Justice Powell noted that this Court has consistently taken the position that:

> "[W]hen a federal constitutional claim is premised on an unsettled question of state law, the federal court should

> stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." 440 U.S. at 268, *quoting Harris County Comm'rs. Court v. Moore*, 420 U.S. 77, 83 (1975).

Justice Powell then went on to disagree that the state statute of limitations issue had been necessarily addressed by the state court and criticized the majority for assuming that it had in an effort to reach the underlying constitutional issues.

> "I find the Court's insistence upon reaching and deciding the merits quite irreconcilable with the long-established doctrine that we abstain from reaching the federal constitutional claim that is premised on unsettled questions of state law without first affording the state courts an opportunity to resolve such questions. I would therefore remand the case. . . ." 440 U.S. at 268-69.

Unlike in *Orr*, it is clear that the Alaska Supreme Court in this case did not address the U of A's statute of limitations defense; and it cannot be assumed that it did in order to reach Van Hyning's federal claims. As a result, if this Court concludes that the Alaska Court wrongfully declined to address Van Hyning's federal constitutional claims, it should remand the case back to the Alaska Court with a mandate to consider the U of A's statute of limitations defense. In addition to complying with principles of abstention, such a course of action would allow the Alaska Court to address Van Hyning's federal claims on their merits before this Court considers such claims. *See Perry v. Sindermann*, 408 U.S. 593, 603 (1972).

CONCLUSION

For all of the foregoing reasons, Van Hyning's appeal to this Court should be dismissed on the grounds: (1) that the judgment of the Alaska Court below rests on an adequate nonfederal basis; and (2) that the federal questions Van Hyning seeks to have reviewed by this Court were not properly raised before and passed upon by the Alaska Court. Supreme Court Rule 16.1(b).

This Court should also deny Van Hyning's alternative petition for certiorari on the grounds: (1) that no substantial federal question meriting plenary consideration by this Court has been raised by Van Hyning; and (2) that the Alaska Court below did not address the federal questions presented to this Court. Supreme Court Rule 17.1(c).

Alternatively, in the event that this Court notes jurisdiction or possible jurisdiction or is inclined to grant certiorari, this Court should instead remand the case back to the Alaska Court for consideration of (1) further dispositive issues of state law and (2) the federal claims in question.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 21st day of August, 1981.

TERRANCE A. TURNER
OWENS & TURNER, P. C.
425 "G" Street, Suite 920
Anchorage, Alaska 99501
(907) 276-3963

Counsel for Appellee.

APPENDIX

APPENDIX I

THE SUPREME COURT OF THE STATE OF ALASKA

JACK VAN HYNING,	)	
	)	
Appellant.	)	
	)	File No. 4022
v.	)	
	)	OPINION
UNIVERSITY OF ALASKA,	)	
	)	
Appellee.	)	
	)	[No. 2267 - January 16, 1981]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage,
Mark C. Rowland, Judge.

Appearances: Robert H. Wagstaff, Wagstaff & Middleton, Anchorage, for Appellant. Sanford M. Gibbs, Hagans, Smith, Brown, Erwin & Gibbs, Anchorage, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Boochever, Burke and Matthews, Justices.*

MATTHEWS, Justice.

Jack Van Hyning was hired by the University of Alaska in the capacity of Assistant Professor of Fisheries Biology in June of 1967 for a 12 month term. This contract was renewed in 1968, 1969, 1970, and 1971. The University's tenure policy, incorporated into Van Hyning's contract, provides that if tenure is not granted at the end of a probationary period, not to exceed six years, a terminal contract may be offered to the

*This case was submitted to the court for decision prior to Justice Boochever's resignation.

probationary employee. One who has been denied tenure is thereafter ineligible for full-time employment at the University.

Briefly, the tenure policy calls for a multi-tiered evaluation of a candidate's effectiveness in teaching, research, intra-faculty relationships, participation in professional societies and service to the University and the general public. The process begins with the recommendation of the head of each faculty department as to each untenured person who has completed four years of service, and proceeds through the hands of the appropriate dean and vice president, finally reaching the university committee on tenure. This committee, composed of seven tenured faculty members elected by their peers, makes an independent evaluation of each tenure candidate. In addition to these written recommendations, the committee may request supplemental information from the applicant, his superiors, tenured colleagues or other persons. If the committee recommends to the president that tenure be denied, the applicant is entitled to notification of that decision. A person who is denied tenure during his fifth year of service may request reconsideration of his case by the president of the University.

In Van Hyning's case the committee recommended against granting tenure. He did not appear before the committee although he was entitled to.[1] The University stipulated that had Van Hyning requested to see the materials it considered in reaching its decision he would have been denied access. It stipulated further that had he so requested, he would have been denied the opportunity to question faculty members whom the committee interviewed in reaching its decision. No statement of reasons for recommending denial of tenure was provided. Van Hyning did not request the president to grant reconsideration of his case.

When the university president informed Van Hyning in April of 1972 of the tenure committee's decision, Van Hyning accepted a terminal contract and resigned effective June 30,

---

[1]Although we can find no such provision in the tenure policy, the parties stipulated that Van Hyning would have been entitled to appear before the tenure committee had he desired to do so.

1973. On May 27, 1976, he sued the University alleging violations of procedural due process in denying him tenure. The University's motion to dismiss under Alaska Rule of Civil Procedure 12 (b) (6)[2] was granted. The superior court found that the action lay in tort and not in contract, and was thus barred by the two year statute of limitations. Additionally, on the merits the court decided that no liberty or property interest was implicated by the denial of tenure and that plaintiff was not entitled to a due process hearing on the question of tenure. This appeal followed.

We conclude that the judgment should be affirmed because of Van Hyning's failure to exhaust his administrative remedies. "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37, 31 L.Ed.2d 17, 25 (1972). *See generally* 3 K. Davis, Administrative Law Treatise §§ 20.01-.10 (Supp. 1970). Here Van Hyning did not appear before the tenure committee and did not take his case to the president after the tenure committee had made its unfavorable recommendation. These failures deprived the University of the opportunity to take further action on his case which could have included a decision affording him tenure. Van Hyning argues that pursuing his remedy administratively any further than he did would necessarily have been futile, but this argument is unsupported in the record, and is essentially incapable of being verified since the effort was not in fact made.

If Van Hyning had promptly challenged the tenure committee's decision in court without first exhausting his administrative remedies, the court, in its discretion, might properly have required him to exhaust those remedies while retaining jurisdiction in the event that doing so did not bring

---

[2]The University's motion was treated as a motion for summary judgment under Alaska R. Civ. P. 56.

him acceptable relief.[3] However, when the court made its ruling such discretionary relief had become, in all probability, impractical[4] due to Van Hyning's four year delay in filing suit, because of intervening commitments made by the University and changes in personnel among the decision makers.

The judgment is AFFIRMED.

---

[3]*See* Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978).

[4]In Jerrell v. Kenai Peninsula Borough School District, 567 P.2d 760, 767 (Alaska 1977), we recognized the "practical concerns" of an educational institution relating to its ability "to effectively plan future hiring." "Prompt decisions on whether a teacher is to be retained are of considerable importance in determining the personnel to be hired for the ensuing school years."

APPENDIX II

UNIVERSITY OF ALASKA

FACULTY BULLETIN

No. 1970-71-5
January 27, 1971

Following review of the recommendation from the University Assembly concerning modification of the University Tenure Policy, the Board of Regents took action at their May and October 1970 meetings. The entire modified Tenure Policy is set forth herewith.

PROCEDURES FOR GRANTING TENURE

The primary function of a university is to provide for continual critical examination of the tenets of truth and for the preservation and extension of these tenets. To accomplish this function, the University must assemble a community of faculty and students, and must provide for them an environment that encourages free and honest inquiry, free expression of ideas, and the development of critical capacities. The primary purpose of a tenure policy is to assure the academic community of such an environment, one that will nurture the pursuit of knowledge, wisdom, and ultimately truth. Such a policy gives the faculty member freedom to teach and study, but it does not release him of his responsibility to maintain high standards of professional integrity and to contribute his maximum to the academic community.

I. UNIVERSITY COMMITTEE ON TENURE

A University Committee on Tenure will consider and advise the President on matters relating to tenure. This Committee shall be composed of seven tenured members of the faculty, chosen for their wisdom and maturity in professional matters. All committee members shall be of the rank of Associate Professor or above; their university duties shall be primarily in

teaching, research, public service, or professional-level service activity. They shall have had at least twelve years of academic experience, preferably at two or more institutions. Committee members shall be chosen for their professional maturity, rather than their affiliation with a particular discipline or administrative unit. They shall be elected for a term of three years by the University Assembly from a slate of candidates presented by a nominating committee selected from among eligible professional personnel of the University Assembly. The slate shall include at least two candidates for each vacancy on the Tenure Committee. Not more than two candidates shall be from the same college, institute, or other major administrative unit of the University. The Committee will elect its own chairman annually.

II. CONDITIONS FOR THE GRANTING OF TENURE

A. To be eligible for consideration for tenure, a person

1. must hold a full-time professional appointment, controlled by the University, and

2. must hold the rank of Assistant Professor or above (or its equivalent in research or service title), and

3. must hold a professional title apart from any administrative assignment, since eligibility for tenure does not extend to administrative positions.

B. Any member of the faculty who has not been offered tenure shall not be retained at the University of Alaska after six years of continuous, full-time service at the rank of Assistant Professor (or equivalent) or above. This provision does not apply to professional staff members whose duties are essentially administrative (less than 50% teaching, research, or public service) or to professional staff members who have attained academic rank other than through regular, systematic review procedures. Tenure in academic rank may be granted to administrative personnel when their qualifications for this assignment are established through regular channels. Tenure reviews will be rigorous, providing assurance that persons of doubtful qualifications will not be retained and that the University's needs are best met. In this way, the "tenure or out" policy will serve as an active force in the development and maintenance of excellence in faculty and programs.

Six years above the rank of Instructor (or equivalent) is a maximum probationary period; tenure may be offered by the President upon appropriate review after a 0-5 year period at the University. However, a person who has served a term of probationary service of more than three years in one or more institutions of higher learning should not be required to serve a probationary period of more than four years. The terms and conditions of every appointment to the faculty will be stated or confirmed in writing, and a copy of the appointment document will be supplied to the faculty member. Any subsequent extensions or modifications of an appointment, and any special understanding, or any notices incumbent upon either party to provide, will be stated or confirmed in writing and a copy will be given to the faculty member.

C. If tenure is offered but declined by a person, the terms of the tenure policy shall be deemed to have been fulfilled and the person may be retained.

D. Associate and Full Professors (or equivalent) who have received an unconditional seventh (or more) continuous contract by 1 July 1966 automatically will be deemed to have been offered tenure as of that date.

E. A faculty member shall be judged on the basis of his total potential contribution to the University when he is being reviewed for tenure. The following criteria will be considered, giving cognizance to the candidate's university assignment:

1. Effectiveness of Teaching: Scholarly level exhibited, creative preparation and presentation of materials, commitment to high academic standards, awareness of students' concerns, and the ability to stimulate and guide them to a high level of achievement; interest in developing methods for imparting the subject matter to the student; participation in curriculum development; recognition of the student as an individual; and effectiveness at individual counseling.

2. Effectiveness of Research: Scholarly level exhibited, commitment to high academic standards, original approach to problems, quality of published and unpublished contributions to knowledge, professional growth as reflected by publications and other creative work, recognition by his peers.

3. Effectiveness in professional-level service extending or supporting teaching or research. Demonstrated competence as an informal instructor or disseminator of information in special field; ability in motivating people to analyze and solve their own problems; appropriate academic background and evidence of continued professional growth; competence in working successfully with others on an individual basis; evidence of insight into community and state problems related to areas of University responsibility; recognition and respect for creative productivity and participation in significant activities of special professional field.

4. Other Criteria.

a. Personal relationships as a member of the faculty: Professional ethics and principles, judgment and tact, cooperativeness, resourcefulness, and responsibility.

b. Participation in professional societies of state or national scope; offices held, committee activities, addresses made.

c. University and public services: Committee work, administrative assignments, sponsoring of student organizations and projects; importance of service to the University, community, and the State.

III. PROCEDURES FOR THE GRANTING OF TENURE

A. The usual procedure for the initiation and processing of an application for tenure will be as follows:

1. Annually not later than 1 October each department head (or other appropriate administrative person) shall prepare a list of names of untenured persons in his department, or other administrative unit, who have completed their fourth year of eligible service. A copy of this list shall be forwarded to his dean or director and a copy to the cognizant vice president.

2. The department head will prepare, or cause to be prepared, a dossier setting forth the qualifications of each

such eligible person whom he intends to recommend (see Section II, "Conditions for the Granting of Tenure," for criteria). After consulting with senior members of his department as appropriate, he will forward this dossier, together with his recommendation and justification, to the appropriate dean or institute director no later than 15 November.

If the department head does not intend to recommend for tenure an eligible faculty member beginning his fifth year of continuous service, he shall prepare, no later than 15 October, a conditional memorandum to that effect, stating his reasons, and deliver the same through review counsel to the President.

3. The dean or institute director will add his recommendations and justifications to the dossier and forward the same to the appropriate vice president no later than 30 November.

4. The vice president will add his recommendations and justifications and forward the entire dossier to the President no later than 31 December.

5. The President will then seek from the University Committee on Tenure an independent evaluation on each candidate under consideration. He will provide the Committee with essential personnel records for review purposes.

6. The Committee will return the personnel records, together with its recommendations and justifications, to the President of the University no later than 1 February. If the Committee is not unanimously agreed on a recommendation, the vote, together with the reasons for the split vote, shall be included in the advisory recommendation.

7. As expeditiously as possible, the person concerned will be notified by the President of the decision on his case. However, notification will not be delayed beyond the date when new contracts are issued (normally about 30 March). The President will also notify both the vice presidents and the chairman of the Committee of his decision on each application; if the decision is contrary to the recommendations of the majority of the committee, he will state the reasons for his decisions.

8. At any stage in this procedure, the administrative officer or the Committee considering the application may request additional information from the person concerned, his administrative superiors, his tenured colleagues at the University of Alaska, or other qualified persons. However, such a request must not be allowed to delay the forwarding of the dossier according to the schedule outlined above.

B. Tenure applications may also be initiated by the individual concerned, the tenured faculty of the department, any administrator to whom the person is responsible, or the University Committee on Tenure. Such applications shall be forwarded through the normal channels as outlined in III A.

C. Under unusual circumstances, tenure applications may be initiated at times other than those indicated above. However, under such circumstances, the procedure outlined above will be followed, with appropriate changes in scheduled dates.

D. Tenure applications which have not been approved are subject to review without prejudice until the end of the fifth year of service.

A person who has been reviewed and not offered tenure during his fifth year of continuous service may request of the President reconsideration of his case.

IV. CONDITIONS FOR THE TERMINATION OF TENURE

A. Tenure will be terminated on 1 July following a faculty member's sixty-fifth (65) birthday. A faculty member over sixty-five (65) may continue to serve on an annual basis without tenure subject to approval by the President of the University.

B. A tenured faculty member may be terminated in case of prolonged medical disability, or financial exigency that prevents payment of salary. Should funds for the position vacated become available within two contract years following such termination for financial exigency the tenured faculty

member shall be invited to return. Should he decide not to accept the offer, he will immediately notify the University so that a suitable replacement may be made.

C. Except on the above grounds, termination of tenure shall be considered only in cases of dismissal for adequate cause.

A faculty member is to be considered for granting of tenure and dismissal for adequate cause in view of his professional integrity as a representative of his special field of qualification, of his profession, and of the University. The definition of adequate cause for dismissal cannot be made precise. The general areas of concern that obviously may generate charges sufficient for dismissal are unprofessional actions, unethical or immoral conduct, or professional incompetence. It is the responsibility of the University to dismiss for cause any member of its faculty who has lost his overall effectiveness in his University assignment as set forth in Section E of "Conditions for the Granting of Tenure."

V. PROCEDURES FOR THE DISMISSAL OF A TENURED FACULTY MEMBER FOR ADEQUATE CAUSE

A. The procedure to be followed in the event of dismissal of a tenured member for adequate cause shall be as follows:

1. Preliminary Proceedings: When the fitness of a faculty member is under question, the appropriate administrative officer shall ordinarily discuss the matter with him directly. If a mutually satisfactory adjustment of the matter does not result, the matter shall be referred to the University Committee on Tenure, augmented for this purpose by two administrative officers who are not immediately concerned with the case and who shall be appointed by the President. This augmented Committee shall make an informal inquiry, assist in arriving at an agreement if possible and, if none is effected, advise the appropriate administrative officer whether proceedings should be instituted toward a dismissal. If the appropriate administrative officer decides, either with or without the concurrence of the Committee, to begin proceedings, then he shall

formulate a statement setting forth the grounds proposed for dismissal, such statement to be presented to the augmented University Committee on Tenure.

2. Initiation of Formal Proceedings: The statement of the administrative officer shall then be incorporated in a letter from the president to the faculty member informing him that an inquiry to determine whether he should be removed from his faculty position on the grounds stated will be conducted by the augmented University Committee on Tenure, meeting at a specified time and place, sufficient time being allowed for the preparation of his defense, such period not to be less than 15 days. The faculty member shall be informed in detail of the procedural rights that will be accorded him, such as his right to counsel and the right to be informed completely of the evidence on which the grounds proposed for dismissal are based. In particular, the procedures specified in Section V.A. 4 below shall be made known to him. The faculty member shall reply to the President in writing whether he wishes a hearing at which he will be present and, if so, shall answer in writing, not less than one week before the date set for the hearing, the administrative officer's statement.

3. Suspension of the Faculty Member: Suspension of a faculty member during the proceedings against him may not be imposed unless it is necessary to avoid harm to individuals. Such suspension shall be with pay.

4. Proceedings of the augmented University Committee on Tenure: Committee considerations shall commence within 30 days after formal proceedings are initiated.

The Committee shall proceed by considering the statement of grounds for dismissal already formulated in the administrative recommendation for dismissal, said statement to be presented to the Committee together with the faculty member's response. If the faculty member has not requested a hearing, the Committee shall consider the case on the basis of available information and decide whether or not a hearing shall be held. Hearings shall be private unless the faculty member requests otherwise and the Committee concurs in the request. If any facts are in dispute, the testimony of witnesses

and other evidence concerning the charges shall be received.

The administrative officer initiating the dismissal proceedings or his representative shall present the evidence for dismissal. The Committee shall determine the order of proof, normally conduct the questioning of witnesses, and, if necessary, assure the presentation of evidence.

The faculty member shall have the option of assistance by counsel. The faculty member shall have the aid of the Committee and of the President in securing the attendance of witnesses. The faculty member or his counsel and the administrative officer initiating the proceedings or his representative shall have the right, within reasonable limits, to question all witnesses who testify orally. The faculty member shall have the opportunity to be confronted by all witnesses adverse to him. If, in the judgment of the Committee, very unusual circumstances make this impossible, the identity of the witness, and his statements, shall be made known to the faculty member. Subject to these safeguards, statements may when necessary be taken outside the hearing and reported to it. All of the evidence shall be duly recorded. The record of the hearing shall be available to the faculty member. If a charge of incompetence is involved, testimony shall include that of teachers and other scholars in his discipline.

On the basis of the hearing the Committee shall reach its decision in conference, giving opportunity to the faculty member or his counsel and the administrative officer initiating the proceedings or his representative to summarize orally before it, and to submit written briefs if the Committee desires. The Committee shall then arrive at explicit findings with respect to each of the grounds for dismissal presented, and formulate its decision for or against removal of the faculty member. The President and the faculty member shall be notified in writing of the Committee's decision no later than 10 days after the close of the hearings. Each shall receive, as promptly as possible, and at the same time, a copy of the record of the hearing.

5. Decision by the President: A decision shall be rendered by the President no later than 15 days after notification by the Committee of their recommendation.

B. Public statements about the case by either the faculty member or administrative officers shall be avoided until the proceedings have been completed, except for such simple announcements as may be required concerning the time of the hearing and similar matters. Any release to the public shall be made through the President's Office.

VI. TERMINATION OF A NON-TENURED FACULTY MEMBER

Notice of non-reappointment, or of intention not to recommend reappointment shall be given in writing in accordance with the following procedures:

1. Not later than 1 March of the first academic year of service, if the appointment expires at the end of that year, or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

2. Not later than 15 December of the second academic year of service if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

3. At least twelve months before the expiration of an appointment after two or more years at the University.

VII. NOTICE BY FACULTY MEMBER OF INTENT TO LEAVE

A faculty member should give six months' notice of his intent to leave the University.

This memorandum supersedes those of the same subject dated March 4, 1966 and December 6, 1968.

/s/_____
William R. Wood
President

Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS
CLERK

No. 81-35

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

JACK VAN HYNING,

Appellant,

v.

UNIVERSITY OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

VAN HYNING'S REPLY TO MOTION TO DISMISS APPEAL

ROBERT H. WAGSTAFF
WAGSTAFF, MIDDLETON & POPE
912 W. Sixth Avenue
Anchorage, Alaska 99501
(907) 277-8611
Counsel for Appellant.

Anchorage, Alaska • Ken Wray's Print Shop, Inc. • (907) 276-4535

QUESTION PRESENTED

Can the highest court of a State avoid a holding of the United States Supreme Court recognizing procedural due process for college faculty in tenure proceedings by *sua sponte* requiring for standing that an unrepresented, six year employed, mandatory "tenure or out" faculty member have first appeared without meaningful notice before the body that determined him to be incompetent and which denied him the due process of law?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF CASES AND AUTHORITIES ii
COMMENT ON APPELLEE'S STATEMENT OF THE CASE 2
COMMENT ON APPLICABLE STANDARD OF REVIEW 5
COMMENTS ON REMAND SUGGESTION 8
CONCLUSION 10

TABLE OF CASES AND AUTHORITIES

Cases: *Page*

Board of Regents v. Roth, 408 U.S. 564 (1972) 7
Matthews v. Eldridge, 424 U.S. 319 (1976) 6
Orr v. Orr, 440 U.S. 268 (1979) 8
Perry v. Sindermann, 408 U.S. 593 (1972) 7
Wolfe v. North Carolina, 364 U.S. 177, 185 (1960) 5

No. 81-35

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

JACK VAN HYNING,

Appellant,

v.

UNIVERSITY OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

VAN HYNING'S REPLY TO MOTION TO DISMISS APPEAL

COMMENT ON APPELLEE'S STATEMENT OF THE CASE

The University incorrectly asserts:

> Following the denial of tenure, Van Hyning accepted a terminal one-year contract of employment with the U of A and thereafter voluntarily resigned from the U of A faculty effective June, 1973. [R. 155] However, Van Hyning has continued since then to teach on a part-time basis at the U of A. [R. 36-37] Van Hyning never applied for employment at any other academic institution following his resignation from the U of A. [R. 34] (Motion to Dismiss p. 3-4).

The University's statement to the effect that Van Hyning continued teaching on a part-time basis at the University of Alaska is misleading. The portion of the record cited by the University is a discovery 'nterrogatory here set forth in full (R-36-37):

10.Q State whether or not you have been employed since you left employment with the University of Alaska, and if so, state with respect to each such employment:

(a) The name, address, and telephone number of such employer;
(b) The dates of your employment with such employer;
(c) Your monthly salary;
(d) The name of your immediate supervisor;
(e) Type of work done;
(f) The reason for termination.

A. Plaintiff was employed as a part-time Lecturer or Adjunct Associate Professor in Fisheries Biology.

(a) University of Alaska, Department of Wildlife & Fisheries and Department of Military Extension. 479-7161
(b) Spring semesters 1974, 1975 and 1976.
(c) Variable depending on credit hours taught.
(d) Dr. Samual Harbo.
(e) Teaching fisheries courses.
(f) End of semester.

The record shows Van Hyning taught only one part-time course in the spring semesters of 1974, 1975 and 1976. Van Hyning has not applied for employment at any other academic institution as he does not want to leave the State of Alaska.

The University policy for CONDITIONS FOR THE GRANTING OF TENURE (6a-8a Jurisdictional Statement) clearly and specifically states that it is "Tenure or Out." Van Hyning is out forever. Through sympathy, compassion, or otherwise, Van Hyning was allowed to be a part-time lecturer in a single course for three semesters.[1]

As *stipulated* below Van Hyning's resignation was less than voluntary:

> "As the direct and proximate result of plaintiff's being denied tenure he resigned from the University of Alaska effective June 30, 1973 in an effort to reduce the professional impact of the denial of tenure. Accordingly, plaintiff stopped teaching at the University of Alaska on June 30, 1973." (20a Jurisdictional Statement).

This resignation was prompted at Van Hyning's Dean's suggestion, *infra.*

The University is further in error when it states: "A candidate who is denied tenure during his fifth year of service could request reconsideration of the decision by the president and appeal the result to the Grievance Committee of the University Assembly." This statement is not supported by the record and is untrue. There is no appeal provided for or taken to any grievance committee. The Alaska Supreme Court did not hold that Van Hyning could or should have gone before any grievance committee. The tenure regulation does not provide for any appeal. The Alaska Supreme Court stated only: "Here Van Hyning did not appear before the tenure committee and did not take his case to the president after the tenure

---

[1]Since the filing of appeal to this Court Van Hyning was asked to fill in for another faculty member for a semester at two thirds pay without fringe or retirement benefits.

committee had made its unfavorable recommendation." (3a Jurisdictional Statement).[2]

The University's statement that Van Hyning never attempted to find out why he was denied tenure is also contrary to the record. It was when Van Hyning made inquiry as to why he was denied tenure that he was advised to resign:

Q. Dr. Van Hyning, when you were first denied tenure, did you inquire of the University, or any individual at the University, as to why you were denied tenure?
A. I inquired of my immediate supervisor, Dean of College.
Q. Who was that, sir?
A. Dr. Dean was the department head and Dean Kessel was the Dean of the College.
Q. Which one did you inquire of?
A. Mainly, Dr. Kessel, we had a conversation.
Q. Can you recall when that conversation took place?
A. Within a week or two after I heard of the decision.
Q. What did Dr. Kessel tell you?
A. At that time she said, "Well, you just didn't produce enough. Your teaching was judged to be not up to our standards. You just didn't produce enough research" or words to that effect.[3]

[Deposition of Jack Van Hyning, P. 12, Lines 5-20]

* * *

Q. So you never then filed any appeal of your denial of tenure with the University.
A. No, I was never informed what the procedure was, or if I could, if it would be desirable, or any guidance as to what I might do.[4]

---

[2]This statement is puzzling inasmuch as it *was* the president who denied tenure.

[3]No more specific reasons have ever been given.

[4]No appeal is provided for. Van Hyning was unrepresented prior to filing suit.

Q. Did you ever discuss with Dean Kessel how you should go about filing an appeal of your denial of tenure?
A. No, we never talked about that specifically.
Q. At the time you were denied tenure, –
A. I might add that during the conversations she advised me that it was standard procedure for the person who was denied to resign from the University. It would look better on my record if I had a resignation rather than –
Q. She never told you that you must resign from the University, did she?
A. She didn't use the word "must," but she strongly advised it.
Q. Because she thought it might look better on your record.
A. Right.
[Jack Van Hyning Deposition, P. 13-14 Lines 22-25 & 1-14][5]

COMMENT ON APPLICABLE STANDARD OF REVIEW

Van Hyning does not quarrel with the authorities cited by the University. This very authority supports the Court's giving this case plenary treatment. As stated in *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960) (University's Motion at p. 6) a State Court,

> "may not avoid federal claims on the basis of non-federal grounds: (1) which lack "fair or substantial support," *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960); (2) which violate federal due process standards, *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964); (3) which constitute an "evasion" of federal rights, *Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904); (4) which interpose "unreasonable obstacles" to the assertion of federal rights, *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923); (5) which "discriminate" against federal rights, *Wolfe v. North Carolina*, 364 U.S. 177, 192 (1960); or (6) which constitute an "arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). See, generally,

---

[5]This testimony was unrebutted and formed the basis of the trial stipulation set forth on 20a of the Jurisidictional Statement and above.

Wright and Miller, Federal Practice & Procedure §4021-28 (1977)."

This is specifically what the Alaska Supreme Court has done in requiring Van Hyning to have appeared as an urepresented, six year employed, mandatory "tenure or out" faculty member before the body that determined him to be incompetent. The Alaska Court has denied Van Hyning a reasonable opportunity to assert bonafide federal rights.

Curiously, *Matthews v. Eldridge*, 424 U.S. 319 (1976) as discussed at length by the University is not helpful to their position. Eldridge could have obtained *full* administrative review of the determination of his social security benefits but filed suit instead. At issue was "whether the denial of Eldridge's claim to continued benefits was a sufficiently 'final' decision with respect to his constitutional claim to satisfy the statutory exhaustion requirement." 428 U.S. 331. Pointing out that "a claim to a pre-deprivation hearing as a matter of right rests on the proper position that full relief cannot be obtained in a post-deprivation hearing" the Court concluded that the denial of the request for benefits constituted a sufficiently final determination. 424 U.S. 331.

The case at bar is considerably stronger in its finality. Van Hyning did exhaust all of the remedies described in the tenure bulletin, save asking for reconsideration of a record he did not have access to. Van Hyning did not do anything else as no appeal was provided for and he was advised to resign by his Dean.

This Court found that Eldridge's failure to raise his constitutional claim administratively did not prevent him from first raising it in court. The secretary had no power to amend the statute alleged as being unconstitutional and "it is unrealistic to expect that the secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicutory context. The secretary would not be required even to consider such a challenge." 424 p. 330. So with Van Hyning and his complaints. Neither the tenure committee, the president of the University, or any purported

grievance committee had the authority to change the tenure bulletin as adopted by the Board of Regents. This tenure bulletin by stipulation does not provide for procedural due process and that is specifically what Van Hyning was requesting.

The substantive discussion in *Eldridge* is helpful to Van Hyning's cause in restating the desirability for a procedural due process hearing *prior* to the deprivation of a property interest. To suggest that Van Hyning has not raised any colorable claim that an erroneous tenure decision by the University of Alaska damaged him in any way not recompensable through retroactive relief denies that the tenure policy specifically provides that it "will be rigorous providing assurance the persons of doubtful qualifications will not be retained."

The University of Alaska asserts that an unsuccessful peer review which is "rigorous providing assurance that persons of doubtful qualifications will not be retained," is really the same as neutral non-retention. Certainly this is the issue of the case. The articulation of the question states the answer. It was tenure or out and Van Hyning is out.

The University further argues that *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972) are not applicable. Nowhere, however, does the University discuss the following quotation from *Roth:*

> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. *The State, for example, did not involve any regulations to bar the respondent from all other public employment in State universities. If it had done so, this again would be a different case. For 'to be deprived not only of present government employment but of future opportunity for it is no small injury' (Citations omitted.) The Court has held, for example, that a state, in regulating the eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravenes due process.' (Citation*

omitted) And, specifically, in a manner that denies the right to full prior hearing (Citation omitted) Ibid, 408 U.S. 573-574; (emphasis supplied).

This is that different case. Van Hyning can never again be employed at the University of Alaska.

COMMENTS ON REMAND SUGGESTION

The trial court found that Van Hyning's federal constitutional claims were barred by a two year tort statute of limitations and were lacking in merit.[6] Van Hyning argued before the Alaska Supreme Court that the University faculty bulletin on tenure (Appendix II, Jurisdictional Statement) was by specific definition made a portion of Van Hyning's yearly contracts of employment and therefore his cause of action lay in contract and not exclusively tort. Van Hyning was required to submit to the tenure process as a condition of employment. In its opinion the Alaska Supreme Court adopted Van Hyning's reasoning: "This contract was renewed in 1968, 1969, 1970 and 1971. The University's tenure policy, *incorporated into Van Hyning's contract,* provides that if tenure is not granted at the end of a probationary period, not to exceed six years, a terminal contract may be offered to the probationary employee. One who has been denied tenure is thereafter ineligible for full-time employment at the University." (1a, 2a Jurisdictional Statement).

In order to reach any perceived exhaustion issue the Alaska Supreme Court necessarily had to find that the action itself was timely brought. There is no need to remand for any determination as to the applicable statute of limitations inasmuch as this question has already been ruled upon.

Notwithstanding, this Court may properly determine whether a claim for violation of federal constitutional rights constitutes tort, contract, or both. See *Orr v. Orr* 440 U.S. 268 (1979). As in *Orr,* it is clear the Alaska Court did address the

---

[6]Alaska has a two year Statute of Limitations for tort (A.S. 09.10.070) and a six year Statute of Limitations for Contract (A.S. 09.10.050).

Statute of Limitations issue when if found that the tenure regulations were incorporated within Van Hyning's contract.

The federal constitutional due process issue was functionally decided as well by the Alaska Court when it found that Van Hyning should have first appeared without representation and meaningful notice before the body that determined him to be incompetent and which denied him the due process of law. "[I]t is irrelevent to inquire . . . when a federal question was raised in a court below when it appears that such question was actually considered and decided." (Citations omitted, 440 U.S. 274-75).

CONCLUSION

For the foregoing reasons this court should note probable jurisdiction and allow Van Hyning to brief the merits of his case and argue.

DATED at Anchorage, Alaska this 25th day of September, 1981.

ROBERT H. WAGSTAFF
WAGSTAFF, MIDDLETON & POPE
912 W. Sixth Avenue
Anchorage, Alaska 99501
(907) 277-8611
Counsel for Appellant.